Volume 4, No. 23, Pages 7881 to 8195, November 6 - November 17, 1989

# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

Depository Document

# FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

James H. Quello

Sherrie P. Marshall

Andrew C. Barrett

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 4 FCC Rcd 1 (1989)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

# Federal Communications Commission Record

Volume 4
Issue 23

## Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities..... viii

Table by Subject Matter..... x

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 7881

# Federal Communications Commission Record

## Table of Cases
## Volume 4
## Issue 23


| Case Name | Page |
|---|---|
| ACC Long Distance Corp. | 8020 |
| AT&T Communications | 7908 |
| AT&T Communications | 7928 |
| AT&T Communications | 7933 |
| AT&T Communications | 8017 |
| AT&T Communications | 8016 |
| AT&T Communications v. Matanuska Telephone Association, Inc. | 7938 |
| Amateur Operator License Examination Fee | 7936 |
| Amendment of Part 36 - Integration of Rates and Services | 8168 |
| Amendment of Part 80 - Narrow-Band Direct-Printing Frequencies | 8072 |
| Amendments of Parts 2 and 15 - Spread Spectrum Systems | 8039 |
| American Indian Broadcast Group, Inc. | 8034 |
| American Telephone & Telegraph Company | 8195 |
| American Telephone and Telegraph Company | 7891 |
| American Telephone and Telegraph Company | 8040 |
| American Telephone and Telegraph Company | 8042 |
| American Telephone and Telephone Co. | 8194 |
| Ameritech Operating Companies | 7944 |
| Ameritech Operating Companies | 7910 |
| Ameritech Operating Companies | 8037 |
| Amherst Broadcasting, Inc. | 8033 |
| Annual 1988 Access Tariff Filings | 7906 |
| Barden, Don H. | 8166 |
| Bell Atlantic Telephone Companies | 7912 |
| BellSouth Telephone Companies | 8028 |
| Black Television Workshop of Los Angeles, Inc. | 8091 |
| C4 Media Cable South | 7937 |
| Carta Corporation | 7973 |
| Concurring Statement of Commr. Dennis - Cable Compulsory License | 8182 |
| Connecticut Office of Consumer Counsel v. AT&T Communications | 8130 |
| Desert Broadcasters | 8104 |
| Diginet, Inc. | 8169 |
| Fee Decisions of the Managing Director Available to the Public | 8112 |
| GTE Spacenet Corporation | 8183 |
| Herrera Broadcasting Partnership | 8098 |
| IBC Broadcasting | 8096 |
| JAM Communications, Inc. | 7881 |
| LECs Access Billing Requirements | 7914 |
| Lauderdale-McKeehan Christian Broadcasting Corporation | 8095 |
| MCI Airsignal, Inc. | 8024 |
| MCI Telecommunications Corporation | 8135 |
| Marlin Broadcasting of Central Florida, Inc. | 7945 |

| Case Name | Page |
|---|---|
| McEwen, Harold | 8101 |
| Metro Program Network, Inc. | 8026 |
| Metroplex Communications, Inc. (WHYI-FM) | 8149 |
| Mid-Ohio/Capitol Communications Limited Partnership | 8125 |
| NJT Limited Partnership | 7969 |
| Pacific Telecom Cable, Inc. | 8061 |
| Panhandle Eastern Pipe Line Company | 8087 |
| Pascal, Charles P. (ERRATA) | 8023 |
| Phone America of Carolina, Inc. | 8018 |
| Phone America of Carolina, Inc. v. GTE South | 8019 |
| Richardson Broadcasting Group | 7989 |
| Rock Hill Telephone Company | 8027 |
| Sarasota-Charlotte Broadcasting Corporation | 8106 |
| Second Meeting of the ONA Joint Conference | 8030 |
| Southern New England Telephone Company's Cost Allocation Manual | 8090 |
| Southwestern Bell Telephone Company | 7939 |
| Stanly Group Broadcasting, Inc. | 8031 |
| Table of Allotments, FM, Apalachicola, FL | 8119 |
| Table of Allotments, FM, Barnwell, SC | 7965 |
| Table of Allotments, FM, Beeville, TX | 8170 |
| Table of Allotments, FM, Bethany Beach, DE | 8121 |
| Table of Allotments, FM, Brantley, AL | 8082 |
| Table of Allotments, FM, Breaux Bridge, LA | 8143 |
| Table of Allotments, FM, Brockport, NY (ERRATUM) | 7894 |
| Table of Allotments, FM, Chamberlain, SD | 8010 |
| Table of Allotments, FM, Chenango Bridge, NY | 7963 |
| Table of Allotments, FM, Clarkesville, GA | 8180 |
| Table of Allotments, FM, Colusa, CA | 8004 |
| Table of Allotments, FM, Creston, IA | 8113 |
| Table of Allotments, FM, Culebra, PR | 8115 |
| Table of Allotments, FM, Denison-Sherman, TX | 8147 |
| Table of Allotments, FM, Detroit Lakes, MN | 8085 |
| Table of Allotments, FM, Dublin, GA | 8176 |
| Table of Allotments, FM, East Hemet, Indio and Rancho, CA | 7895 |
| Table of Allotments, FM, Edinboro, PA | 8080 |
| Table of Allotments, FM, Essex, CA | 8084 |
| Table of Allotments, FM, Evans and Martinez, GA | 7926 |
| Table of Allotments, FM, Fairfield and Norwood, OH | 8174 |
| Table of Allotments, FM, Flint Harbor Beach and Sebewaing, MI | 8012 |
| Table of Allotments, FM, Gadsden, Holly Pond and Attalla, AL | 7903 |
| Table of Allotments, FM, Gardner, IL | 8178 |
| Table of Allotments, FM, Georgetown and Myrtle Beach, SC | 8117 |
| Table of Allotments, FM, Gilchrist, TX | 8145 |
| Table of Allotments, FM, Grove City, PA and Hubbard, OH | 7904 |
| Table of Allotments, FM, Harrisonville and Carrollton, MO | 8014 |
| Table of Allotments, FM, Heidelberg, MS | 8006 |

| Case Name | Page |
|---|---|
| Table of Allotments, FM, Hot Springs and Pine Ridge, SD | 7925 |
| Table of Allotments, FM, Kaukauna and Cleveland, WI | 8002 |
| Table of Allotments, FM, Kealakekua, HI | 7967 |
| Table of Allotments, FM, Lincoln City, OR | 8008 |
| Table of Allotments, FM, Llano and Kerrville, TX | 7900 |
| Table of Allotments, FM, Mora, MN | 8141 |
| Table of Allotments, FM, Morehead City, NC | 7921 |
| Table of Allotments, FM, Newberry, MI | 7917 |
| Table of Allotments, FM, Newport, OR | 7923 |
| Table of Allotments, FM, Newton and Sullivan, IL | 7919 |
| Table of Allotments, FM, Olive Branch, MS | 7884 |
| Table of Allotments, FM, Prairie Grove, AR | 8138 |
| Table of Allotments, FM, Prairie du Chien, WI | 7961 |
| Table of Allotments, FM, Randolph and Brandon, VT | 7958 |
| Table of Allotments, FM, Raymondville, Alice and Falfurrias, TX | 8078 |
| Table of Allotments, FM, Refugio, TX | 7899 |
| Table of Allotments, FM, Rockport, Gregory and Alice, TX | 8075 |
| Table of Allotments, FM, Saint Robert and Sparta, MO | 8123 |
| Table of Allotments, FM, Santa Margarita and Guadelupe, CA | 7887 |
| Table of Allotments, FM, Shawano, WI | 8172 |
| Table of Allotments, FM, Stephenson, MI | 8139 |
| Telecom Broadcasting, Inc. | 8185 |
| Telegraph Service Corporation | 8184 |
| Telephone and Data Systems, Inc. | 8021 |
| The Taber Broadcasting Company of New Mexico | 7892 |
| United States Liberia Radio Corporation | 8167 |
| Virgin Islands Telephone Corporation | 8094 |
| WWOR-TV, Inc. | 8127 |

## Table of Cases by Delegated Authority and FCC Number
Volume 4
Issue 23


| Delegated Authority or FCC Number | Page | Delegated Authority or FCC Number | Page |
|---|---|---|---|
| DA 89 -1134 | 7944 | DA 89 -1385 | 8138 |
| DA 89 -1254 | 7939 | DA 89 -1386 | 8115 |
| DA 89 -1289 | 8027 | DA 89 -1387 | 8117 |
| DA 89 -1316 | 7894 | DA 89 -1388 | 8119 |
| DA 89 -1317 | 8024 | DA 89 -1389 | 8121 |
| DA 89 -1325 | 8004 | DA 89 -1390 | 8123 |
| DA 89 -1327 | 7895 | DA 89 -1391 | 8139 |
| DA 89 -1328 | 7899 | DA 89 -1392 | 8141 |
| DA 89 -1329 | 7900 | DA 89 -1393 | 8028 |
| DA 89 -1330 | 7903 | DA 89 -1394 | 7891 |
| DA 89 -1332 | 7904 | DA 89 -1395 | 8030 |
| DA 89 -1339 | 8037 | DA 89 -1396 | 8039 |
| DA 89 -1345 | 8006 | DA 89 -1397 | 7884 |
| DA 89 -1346 | 8008 | DA 89 -1398 | 7887 |
| DA 89 -1347 | 8010 | DA 89 -1399 | 7936 |
| DA 89 -1355 | 8012 | DA 89 -1402 | 8112 |
| DA 89 -1356 | 8014 | DA 89 -1403 | 7937 |
| DA 89 -1357 | 7917 | DA 89 -1404 | 8183 |
| DA 89 -1358 | 7919 | DA 89 -1405 | 8143 |
| DA 89 -1359 | 7921 | DA 89 -1406 | 8145 |
| DA 89 -1360 | 7923 | DA 89 -1407 | 8147 |
| DA 89 -1361 | 7925 | DA 89 -1408 | 8170 |
| DA 89 -1362 | 7926 | DA 89 -1409 | 8172 |
| DA 89 -1364 | 8096 | DA 89 -1410 | 8174 |
| DA 89 -1365 | 8098 | DA 89 -1411 | 8176 |
| DA 89 -1366 | 8101 | DA 89 -1412 | 8178 |
| DA 89 -1367 | 8104 | DA 89 -1413 | 8180 |
| DA 89 -1368 | 7969 | DA 89 -1417 | 7938 |
| DA 89 -1370 | 8075 | DA 89 -1418 | 8023 |
| DA 89 -1371 | 8078 | DA 89 -1419 | 8017 |
| DA 89 -1372 | 8080 | DA 89 -1420 | 8021 |
| DA 89 -1373 | 8113 | DA 89 -1428 | 8016 |
| DA 89 -1375 | 8002 | DA 89 -1429 | 8018 |
| DA 89 -1376 | 7958 | DA 89 -1430 | 8019 |
| DA 89 -1377 | 7961 | DA 89 -1431 | 8020 |
| DA 89 -1378 | 7963 | DA 89 -1434 | 8087 |
| DA 89 -1379 | 7965 | DA 89 -1437 | 8090 |
| DA 89 -1380 | 7967 | DA 89 -1438 | 8091 |
| DA 89 -1381 | 8082 | DA 89 -1440 | 8182 |
| DA 89 -1382 | 8084 | DA 89 -1441 | 8094 |
| DA 89 -1383 | 8085 | DA 89 -1450 | 8169 |

| Delegated Authority or FCC Number | Page |
|---|---|
| DA 89 -1451 | 8184 |
| DA 89 -1452 | 8185 |
| DA 89 -1453 | 8194 |
| DA 89 -1454 | 8195 |
| DA 89 -1456 | 8167 |
| FCC 89 - 289 | 8026 |
| FCC 89 - 290 | 7906 |
| FCC 89 - 291 | 8095 |
| FCC 89 - 292 | 7908 |
| FCC 89 - 293 | 7910 |
| FCC 89 - 297 | 7912 |
| FCC 89 - 299 | 7914 |
| FCC 89 - 302 | 7928 |
| FCC 89 - 303 | 7933 |
| FCC 89 - 304 | 8061 |
| FCC 89 - 305 | 8040 |
| FCC 89 - 306 | 8042 |
| FCC 89 - 308 | 7892 |
| FCC 89 - 310 | 8072 |
| FCC 89 - 311 | 8168 |
| FCC 89 - 315 | 8130 |
| FCC 89 - 317 | 8135 |
| FCC 89D - 48 | 7881 |
| FCC 89D - 49 | 7973 |
| FCC 89D - 50 | 7989 |
| FCC 89D - 51 | 8034 |
| FCC 89D - 52 | 8106 |
| FCC 89I - 69 | 8031 |
| FCC 89I - 80 | 8033 |
| FCC 89R - 62 | 7945 |
| FCC 89R - 67 | 8149 |
| FCC 89R - 69 | 8125 |
| FCC 89R - 70 | 8127 |
| FCC 89R - 71 | 8166 |

## Table of Cases by Docket Number
## Volume 4
## Issue 23


| Docket Number | | | | Page |
|---|---|---|---|---|
| BC | Dkt.No.81 | - | 159 | 8033 |
| CC | Dkt.No.80 | - | 286 | 8168 |
| CC | Dkt.No.87 | - | 255 | 7912 |
| CC | Dkt.No.87 | - | 568 | 7928 |
| CC | Dkt.No.87 | - | 579 | 7914 |
| CC | Dkt.No.88 | - | 1 | 7906 |
| CC | Dkt.No.88 | - | 2 | 8030 |
| CC | Dkt.No.88 | - | 136 | 7944 |
| CC | Dkt.No.88 | - | 136 | 8037 |
| CC | Dkt.No.88 | - | 471 | 7933 |
| CC | Dkt.No.88 | - | 497 | 7908 |
| CC | Dkt.No.88 | - | 528 | 7910 |
| GEN | Dkt.No.89 | - | 354 | 8039 |
| MM | Dkt.No.85 | - | 216 | 7945 |
| MM | Dkt.No.86 | - | 180 | 8031 |
| MM | Dkt.No.86 | - | 289 | 7887 |
| MM | Dkt.No.87 | - | 42 | 8075 |
| MM | Dkt.No.87 | - | 50 | 8149 |
| MM | Dkt.No.87 | - | 88 | 8078 |
| MM | Dkt.No.87 | - | 173 | 7881 |
| MM | Dkt.No.87 | - | 260 | 7884 |
| MM | Dkt.No.88 | - | 21 | 7973 |
| MM | Dkt.No.88 | - | 34 | 7900 |
| MM | Dkt.No.88 | - | 51 | 7926 |
| MM | Dkt.No.88 | - | 65 | 7895 |
| MM | Dkt.No.88 | - | 186 | 7961 |
| MM | Dkt.No.88 | - | 330 | 7903 |
| MM | Dkt.No.88 | - | 362 | 8166 |
| MM | Dkt.No.88 | - | 382 | 8127 |
| MM | Dkt.No.88 | - | 397 | 8084 |
| MM | Dkt.No.88 | - | 407 | 7989 |
| MM | Dkt.No.88 | - | 421 | 8125 |
| MM | Dkt.No.88 | - | 538 | 8106 |
| MM | Dkt.No.88 | - | 552 | 8034 |
| MM | Dkt.No.88 | - | 604 | 8138 |
| MM | Dkt.No.89 | - | 14 | 7925 |
| MM | Dkt.No.89 | - | 21 | 7904 |
| MM | Dkt.No.89 | - | 29 | 7899 |
| MM | Dkt.No.89 | - | 38 | 8012 |
| MM | Dkt.No.89 | - | 96 | 8014 |
| MM | Dkt.No.89 | - | 314 | 8004 |
| MM | Dkt.No.89 | - | 420 | 7894 |
| MM | Dkt.No.89 | - | 470 | 7969 |
| MM | Dkt.No.89 | - | 471 | 8006 |
| MM | Dkt.No.89 | - | 472 | 8008 |
| MM | Dkt.No.89 | - | 473 | 8010 |
| MM | Dkt.No.89 | - | 479 | 7917 |
| MM | Dkt.No.89 | - | 480 | 7919 |
| MM | Dkt.No.89 | - | 481 | 7921 |
| MM | Dkt.No.89 | - | 482 | 7923 |
| MM | Dkt.No.89 | - | 483 | 8096 |
| MM | Dkt.No.89 | - | 484 | 8080 |
| MM | Dkt.No.89 | - | 485 | 8113 |
| MM | Dkt.No.89 | - | 486 | 8002 |
| MM | Dkt.No.89 | - | 487 | 7958 |
| MM | Dkt.No.89 | - | 488 | 7963 |
| MM | Dkt.No.89 | - | 489 | 7965 |
| MM | Dkt.No.89 | - | 490 | 7967 |
| MM | Dkt.No.89 | - | 491 | 8082 |
| MM | Dkt.No.89 | - | 492 | 8085 |
| MM | Dkt.No.89 | - | 493 | 8104 |
| MM | Dkt.No.89 | - | 495 | 8115 |
| MM | Dkt.No.89 | - | 496 | 8117 |
| MM | Dkt.No.89 | - | 497 | 8119 |
| MM | Dkt.No.89 | - | 498 | 8121 |
| MM | Dkt.No.89 | - | 499 | 8123 |
| MM | Dkt.No.89 | - | 500 | 8139 |
| MM | Dkt.No.89 | - | 501 | 8141 |
| MM | Dkt.No.89 | - | 505 | 8101 |
| MM | Dkt.No.89 | - | 506 | 8098 |
| MM | Dkt.No.89 | - | 507 | 8143 |
| MM | Dkt.No.89 | - | 508 | 8145 |
| MM | Dkt.No.89 | - | 509 | 8147 |
| MM | Dkt.No.89 | - | 510 | 8170 |
| MM | Dkt.No.89 | - | 511 | 8172 |
| MM | Dkt.No.89 | - | 512 | 8174 |
| MM | Dkt.No.89 | - | 513 | 8176 |
| MM | Dkt.No.89 | - | 514 | 8178 |
| MM | Dkt.No.89 | - | 515 | 8180 |
| PR | Dkt.No.89 | - | 524 | 8072 |

# Federal Communications Commission Record

## Table of Cases by Rulemaking Number
## Volume 4
## Issue 23


| Rulemaking Number | Page | Rulemaking Number | Page |
|---|---|---|---|
| RM - 5389 | 7887 | RM - 6751 | 7967 |
| RM - 5523 | 8078 | RM - 6773 | 8004 |
| RM - 5578 | 8078 | RM - 6816 | 8147 |
| RM - 5728 | 7884 | RM - 6845 | 7894 |
| RM - 5882 | 8075 | RM - 6855 | 7958 |
| RM - 5883 | 8075 | RM - 6860 | 8170 |
| RM - 5884 | 8075 | RM - 6877 | 8119 |
| RM - 5947 | 8078 | RM - 6897 | 8176 |
| RM - 6076 | 7926 | RM - 6898 | 8180 |
| RM - 6086 | 7900 | RM - 6900 | 8085 |
| RM - 6188 | 7895 | RM - 6913 | 8002 |
| RM - 6210 | 7903 | RM - 6916 | 8121 |
| RM - 6246 | 7961 | RM - 6918 | 7921 |
| RM - 6265 | 7926 | RM - 6919 | 8008 |
| RM - 6271 | 8138 | RM - 6920 | 7923 |
| RM - 6304 | 7903 | RM - 6928 | 8123 |
| RM - 6326 | 8084 | RM - 6931 | 8010 |
| RM - 6335 | 7900 | RM - 6932 | 7963 |
| RM - 6342 | 7895 | RM - 6940 | 8115 |
| RM - 6343 | 7895 | RM - 6941 | 8172 |
| RM - 6344 | 7895 | RM - 6942 | 8113 |
| RM - 6473 | 7903 | RM - 6945 | 8082 |
| RM - 6500 | 7919 | RM - 6946 | 8143 |
| RM - 6517 | 8012 | RM - 6955 | 7965 |
| RM - 6524 | 7925 | RM - 6970 | 8139 |
| RM - 6548 | 7899 | RM - 6971 | 8117 |
| RM - 6554 | 8072 | RM - 6972 | 8080 |
| RM - 6566 | 7904 | RM - 6973 | 8174 |
| RM - 6658 | 8014 | RM - 6975 | 8145 |
| RM - 6697 | 8006 | RM - 6978 | 8178 |
| RM - 6731 | 7904 | RM - 7030 | 7917 |
| | | RM - 7041 | 8141 |

## Table of Cases by City
Volume 4
Issue 23


| City/State | Page | City/State | Page |
|---|---|---|---|
| Alexandria, LA | 8096 | Gregory, TX | 8075 |
| Alice, TX | 8075 | Grove City, PA | 7904 |
| Alice, TX | 8078 | Harrisonville, MO | 8014 |
| Amherst, MA | 8033 | Heidelberg, MS | 8006 |
| Apalachicola, FL | 8119 | Holly Pond, AL | 7903 |
| Armstrong, TX | 8075 | Hot Springs, SD | 7925 |
| Attalla, AL | 7903 | Hubbard, OH | 7904 |
| Beeville, TX | 8170 | Indio, CA | 7895 |
| Bethany Beach, DE | 8121 | Jackson, MS | 7881 |
| Brandon, VT | 7958 | Kaukauna, WI | 8002 |
| Brantley, AL | 8082 | Kealakekua, HI | 7967 |
| Branwell, SC | 7965 | Kerrville, TX | 7900 |
| Breaux Bridge, LA | 8143 | Lauderdale, FL | 8149 |
| Brockport, NY | 7894 | Lawton, OK | 8101 |
| Carrollton, MO | 8014 | Lincoln City, OR | 8008 |
| Cedar Rapids, IA | 8026 | Llano, TX | 7900 |
| Chamberlain, SD | 8010 | Los Angeles, CA | 8091 |
| Chenango Bridge, NY | 7963 | Loudon, TN | 8095 |
| Clarkesville, GA | 8180 | Maljamar, NM | 7892 |
| Cleveland, WI | 8002 | Martinez, GA | 7926 |
| Columbus, OH | 8125 | Merced, CA | 8098 |
| Colusa, CA | 8004 | Mora, MN | 8141 |
| Creston, IA | 8113 | Morehead City, NC | 7921 |
| Denison-Sherman, TX | 8147 | Myrtle Beach, FL | 8117 |
| Denver, CO | 8031 | Newberry, MI | 7917 |
| Detroit Lakes, MN | 8085 | Newport, OR | 7923 |
| Dublin, GA | 8176 | Newton, IL | 7919 |
| East Hemet, CA | 7895 | Norwood, OH | 8174 |
| Edinboro, PA | 8080 | Olive Branch, MS | 7884 |
| Englewood, FL | 8106 | Orlanda, FL | 7945 |
| Essex, CA | 8084 | Pine Ridge, SD | 7925 |
| Evans, GA | 7926 | Prairie Grove, AR | 8138 |
| Fairfield, OH | 8174 | Prairie du Chien, WI | 7961 |
| Falfurrias, TX | 8078 | Rancho, CA | 7895 |
| Flint Harbor Beach, MI | 8012 | Randolph, VT | 7958 |
| Fresno, CA | 7973 | Raymondville, TX | 8078 |
| Gadsden, AL | 7903 | Refugio, TX | 7899 |
| Gardner, IL | 8178 | Rockport, TX | 8075 |
| Georgetown, SC | 8117 | Rosamond, CA | 8104 |
| Gilchrist, TX | 8145 | Saint Robert, MO | 8123 |
| Girard, KS | 8014 | San Angelo, TX | 8034 |
| Grand Rapids, MI | 8166 | Santa Margarita, CA | 7887 |

| City/State | Page |
|---|---|
| Sebewaing, MI | 8012 |
| Secaus, NJ | 8127 |
| Shawano, WI | 8172 |
| Southern Pines, NC | 7989 |
| Sparta, MO | 8123 |
| Stephenson, MI | 8139 |
| Sullivan, IL | 7919 |
| Sun City, CA | 7895 |
| Temecula, CA | 7895 |
| Tucson, AZ | 7969 |

Subject Index
Volume 4
Issue 23


| Subject | Page |
|---|---|
| Adjudication | |
| Civic participation | 7973 |
| Administrative Law Judge Decision | |
| Comparative coverage | 7945 |
| Financial qualifications | 8149, 7945 |
| Integration of ownership into management, quantitative aspect | 8149, 7945, |
| Renewal expectancy | 8149 |
| Orders or Notices | |
| Reopening of record | 7973 |
| Review Board or Commission Decision | |
| Financial qualifications | 7881 |
| Integration of ownership into management, quantitative | 7989, 7989 |
| Reopening of record | 7989 |
| Broadcast Radio Services - General Rules | |
| Applications | |
| Facilities, applications to modify/change control of unbuilt | 8033 |
| Applications for authorization | |
| Conflicts in applications, agreement for removing | 8031 |
| Public notice of filing of broadcast applications, local | 7892 |
| Operation of station | |
| Program tests | 8026 |
| Broadcasting - FM Stations | |
| Allotments and assignments | |
| Allotments, table of | 7884, 7887, 7900, 7903, 7919, 7921, 7926, 7894, 8006, 8008, 8014, 8075, 8082, 8084, 8115, 8117, 8123, 8139, 8145, 8147, 8172, 8174, 8180, 7961, 7967, 8002 |
| Carriers: Service Altered | |
| Cable television video programming facilities | |
| Waiver to 63.54 and 63.55 | 7937 |

| Subject | Page |
|---|---|
| Extensions and supplements | |
| Applications, contents of | 7937, 8042 |
| **Common Carriers: Miscellaneous Rules** | |
| Enhanced services (computer) and customer-premises equipment | 8027 |
| **Communications Act of 1934** | |
| Common Carriers | |
| Extension of lines, certificate for | 7937 |
| Penal provisions; forfeitures | |
| Rebates and offsets, forfeitures in cases of | 8026 |
| Radio, provisions relating to | |
| Applications, special requirements with respect to | 8031 |
| Competition in commerce, facilities for | 8040 |
| Construction permits | 8026 |
| License for radio communication or transmission of energy | 8026 |
| **Practice and Procedure** | |
| Common carriers: complaints | |
| Formal or informal | 8016, 8018, |
| Hearing proceedings: presiding officer's rulings | |
| Interlocutory ruling, appeal from | 8125, 8127 |
| Reconsideration/review of Commission action | |
| Actions by delegated authority, application for review of | 7892, 7914 |
| Reconsideration of a final FCC action, petition for | 7906, 8095 |
| **Public Mobile Service** | |
| Applications and licenses-processing | |
| Ownership changes and agreements to amend/dismiss | 8021 |
| Domestic public cellular radio telecommunications service | |
| Applications for markets below the top 90, ownership in | 8021 |
| **Statutory Citations Other than Communications** | |
| Administrative Procedure | |
| Information,public; agency rules, opinions, orders | 8023 |
| **Tariffs (Schedules of Rates and Regulations)** | |
| Rules, general | |
| Letters of transmittal: supporting information to be submitted | 7939, 7908, |
| Private line rate structure, guidelines for | 7908 |
| Specific tariff publications | |

# TABLE OF STATUTORY AND RULE PROVISIONS


| | Page |
|---|---|
| (Donald P. Harris d/b/a/ DESERT BROADCASTERS) (Rosamond, Cal | 8104 |
| (Harold Mcewen) (Lawton, Oklahoma) | 8101 |
| (Herrera Broadcasting Partnership) (Merced, California) | 8098 |
| (Lonnie W. Hutto d/b/a/ IBC Broadcasting) (Alexandria, Louis | 8096 |
| (NJT Limited Partnership) (Tucson, Arizona) | 7969 |
| 000.005 U.S.C. 410(c), Announcing ONA Joint Conference | 8030 |
| 000.047 C.F.R. 001.773; Petitions for suspension of new tari | 7891 |
| 000.047 CFR 064.702, Equal Access Conversion | 8027 |
| 000.047 U.S.C. Section 202(a), unreasonable discrimination | 7933 |
| 000.047 U.S.C. § 204(a) | 7912 |
| 000.154(i) issuance of orders, rejection of rate changes | 7939 |
| 000.204(b) partial authorization of charges | 7939 |
| 000.291 authority delegated | 7944 |
| 001.080 Forfeiture proceedings | 8167 |
| 001.106 Petition for Reconsideration | 8091 |
| 001.106 Petitions for reconsideration | 8095 |
| 001.115 Application for review of action taken pursuant to d | 7892 |
| 001.301 Appeal, Denied | 8127 |
| 001.301(a)(1) Appeal, Denied | 8125 |
| 001.711 Formal or informal complaints | 7938 |
| 001.711 Formal or informal complaints | 8016 |
| 001.711 Formal or informal complaints | 8017 |
| 001.711 Formal or informal complaints | 8018 |
| 001.711 Formal or informal complaints | 8019 |
| 011.65 Substantial and significant changes in information | 8021 |
| 022.29 Ownership changes and agreements to amend or dismiss | 8021 |
| 022.921 Ownership in applications for cellular service | 8021 |
| 023.050 Place of filing application | 8167 |
| 032.014 Regulated Accounts | 8090 |
| 032.023 Nonregulated Activities | 8090 |
| 036.125 Local Switching Equipment -- Category 3 | 7910 |
| 047.000 C.F.R. § 1.115(a); FCC 89-299 | 7914 |
| 061.038 Supporting information to be submitted | 7908 |
| 061.038 Supporting information to be submitted | 7910 |
| 061.038 waivers rescinded | 7939 |
| 061.040 Private line rate structure guidelines | 7908 |
| 061.056, 61.58, and 61.59 | 7939 |
| 063.001 Contents of Application | 8183 |
| 063.001 Contents of Application | 8194 |
| 063.001 Contents of Application | 8195 |
| 063.001 Contents of Applications | 7937 |
| 063.001 Contents of Applications | 8042 |
| 063.056 Waivers | 7937 |
| 064.901 Allocation of Costs | 8090 |
| 069.003 Filing of access service tariffs | 8020 |
| 073.1620 Program Tests | 8026 |
| 073.202 FM Table of Allotments | 7884 |
| 073.202 FM Table of Allotments | 7887 |
| 073.202 FM Table of Allotments | 7895 |
| 073.202 FM Table of Allotments | 7899 |

073.202 FM Table of Allotments ..... 7900
073.202 FM Table of Allotments ..... 7903
073.202 FM Table of Allotments ..... 7917
073.202 FM Table of Allotments ..... 7919
073.202 FM Table of Allotments ..... 7958
073.202 FM Table of Allotments ..... 7961
073.202 FM Table of Allotments ..... 7967
073.202 FM Table of Allotments ..... 8002
073.202 FM Table of Allotments ..... 8004
073.202 FM Table of Allotments ..... 8006
073.202 FM Table of Allotments ..... 8012
073.202 FM Table of Allotments ..... 8014
073.202 FM Table of Allotments ..... 8075
073.202 FM Table of Allotments ..... 8078
073.202 FM Table of Allotments ..... 8082
073.202 FM Table of Allotments ..... 8084
073.202 FM Table of Allotments ..... 8085
073.202 FM Table of Allotments ..... 8119
073.202 FM Table of Allotments ..... 8121
073.202 FM Table of Allotments ..... 8123
073.202 FM Table of Allotments ..... 8138
073.202 FM Table of Allotments ..... 8139
073.202 FM Table of Allotments ..... 8141
073.202 FM Table of Allotments ..... 8143
073.202 FM Table of Allotments ..... 8145
073.202 FM Table of Allotments ..... 8147
073.202 FM Table of Allotments ..... 8170
073.202 FM Table of Allotments ..... 8172
073.202 FM Table of Allotments ..... 8176
073.202 FM Table of Allotments ..... 8178
073.202 FM Table of Allotments ..... 8180
073.202, FM Table of Allotments ..... 7894
073.202, FM Table of Allotments ..... 7904
073.202, FM Table of Allotments ..... 7921
073.202, FM Table of Allotments ..... 7923
073.202, FM Table of Allotments ..... 7925
073.202, FM Table of Allotments ..... 7926
073.202, FM Table of Allotments ..... 7963
073.202, FM Table of Allotments ..... 7965
073.202, FM Table of Allotments ..... 8008
073.202, FM Table of Allotments ..... 8010
073.202, FM Table of Allotments ..... 8080
073.202, FM Table of Allotments ..... 8113
073.202, FM Table of Allotments ..... 8115
073.202, FM Table of Allotments ..... 8117
073.202, FM Table of Allotments ..... 8174
073.3525 Settlement, Approved ..... 8166
073.3525 Agreements for removing application conflicts ..... 8031
073.3535 Agreements for Removing Application Conflicts ..... 8033
073.3580 Local public notice of filing of broadcast applicat ..... 7892
073.3597 Procedures on Transfer & Assignment Applications ..... 8091
080.361 Frequencies for narrow-band direct-printing (NB-DP) ..... 8072
090.63(a)(2) Power Radio Service ..... 8087
094.009(b)(1) Permissibility of communications ..... 8169

097.527 Reimbursement for expenses ..... 7936
204(a) lawfulness of new charges, suspension ..... 7944
300.034-039 Landing and Operation of Submarine Cables ..... 8061
300.201 Service and Charges ..... 8130
300.201 Service and Charges ..... 8135
300.202 Discrimination and Preferences ..... 8130
300.208 Complaints to the Commission ..... 8130
300.208 Complaints to the Commission ..... 8135
300.214 Extension of Lines ..... 7937
300.214 Extension of Lines ..... 8042
300.214 Extension of Lines ..... 8183
300.214 Extension of Lines ..... 8194
300.214 Extension of Lines ..... 8195
300.301 License for Radio Communication or Transmission ..... 8026
300.308 Applications for licenses ..... 8167
300.309 Action in Authorization ..... 8184
300.309 Action in Authorization ..... 8185
300.310 Limitation on Holding & Transfer of Licenses ..... 8091
300.311 Settlement Agreements ..... 8031
300.314-039 Landing and Operation of Submarine Cables ..... 8040
300.317 "Payola" Issue ..... 8149
300.319 Construction Permits ..... 8026
300.503 Forfeitures in cases of rebates and offsets ..... 8026
300.613 Ownership Restrictions ..... 7937
400.05552 Public Information; agency rules, opinions, order, ..... 8023
400.05701-706 Judicial Review ..... 8023
5 USC § 410(c) ..... 8168
500.035 - Integration, Quantitative ..... 7973
500.125 - Misrepresentation ..... 8034
500.150 - Alien Ownership ..... 7973
500.2005 Integration of Ownership into Management, qualitati ..... 7989
500.2005 Integration of Ownership into Management, Qualitati ..... 8106
500.2020 Integration of Ownership (qualitative), female owne ..... 8106
500.2035 Integration of Ownership into Management, quantitat ..... 7989
500.2040 Integration of Ownership, Questions re effectuation ..... 8106
500.2065 Comparative Coverage ..... 8106
500.2165 Environmental Impact (RF Radiation) ..... 7989
500.2170 Financial Qualifications ..... 7881
500.3005 Integration of Ownership/Management,Qualitative Asp ..... 7945
500.3035 Integration of Ownership into Management, Sham Appl ..... 8149
500.3035 Integration of Ownership/Management,Quantitative & ..... 7945
500.3065 Comparative Coverage ..... 7945
500.3080 Renewal Expectancy ..... 8149
500.3170 Financial Qualifications ..... 7945
500.3170 Financial Qualifications, Lack of ..... 8149
Access Terms & Cond.; DA 89-1393 ..... 8028
CC Dkt 88-1, Phase II; 000.204, Inv.; 001.106, Pet. for Reco ..... 7906
CC Docket No. 88-471, AT&T Trans 1215 ..... 7933
Section 22.33 Grants by random selection. ..... 8024
Unjust or unreasonable charges 47 C.F.R. § 202(a) ..... 7928

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-173**

In re Applications of

JAM COMMUNICATIONS, INC. File No. BPCT-870121KF

For Construction Permit
for a New Television Station
Jackson, Mississippi

**Appearances**

*Seymour M. Chase, Esquire*, on behalf of JAM Communications, Inc.; *Donald Evans, Esquire*, on behalf of Delta Television Limited; and *Larry A. Miller, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

## SUPPLEMENTAL SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

**Issued: October 31, 1989; Released: November 6, 1989**

### PRELIMINARY STATEMENT

1. By *Memorandum Opinion and Order*, FCC 89R-26, released May 2, 1989, the Review Board remanded this proceeding to the Presiding Judge for the adduction of additional evidence and preparation of a Supplemental Initial Decision on the following issues:

(1) To determine whether JAM Communications, Inc., is financially qualified to be a Commission licensee.

(2) To determine whether Delta Television Limited is financially qualified to be a Commission licensee.

2. The Review Board, in adding the above issues, directed that each applicant will be required to document and/or demonstrate the following: (1) the originally-planned costs of construction and operation as formulated by both applicants before certifying and filing their respective applications; (2) their financial condition (including pertinent financial statements, clearly delineating liquid and non-liquid assets, as well as current and long-term liabilities) as of the date of certification; (3) the documents relied upon and reviewed by each individual who executed and certified the respective applications; (4) the facts and circumstances surrounding the obtaining of the "bank letters" referenced by each applicant, including the representations and documentation available to each lending institution, and as reviewed by these institutions, before issuance of these "bank letters"; (5) the letters obtained from each financial institution for each applicant; (6) the discussions held between individual principals of each applicant concerning their financial qualifications and sources of funds prior to certification.

3. A prehearing conference for consideration of the remand issues was held on May 31, 1989. Thereafter, by *Memorandum Opinion and Order*, FCC 89M-2006, released July 31, 1989, the Presiding Judge granted the unopposed "Motion to Dismiss Application" filed by JAM Communications, Inc., and dismissed, with prejudice, the application of Delta Television Limited for failure to prosecute.

4. Presently before the Presiding Judge are a "Motion for Summary Decision" filed by JAM Communications, Inc. (JAM) on September 20, 1989[1]; "Mass Media Bureau's Comments on Motion for Summary Decision" filed by the Bureau on October 4, 1989; "Supplement and Motion for Leave to File" filed by JAM on October 10, 1989; and "Mass Media Bureau's Comments in Support of Motion for Summary Decision" filed by the Bureau on October 19, 1989.

### FINDINGS OF FACT

5. JAM Communications, Inc. (JAM) estimated its cost of construction and three months' operating costs to total $4,393,074.29. This sum was developed by John A. Peoples, a vice-president, director, and one-third stock subscriber of JAM. Peoples reviewed equipment cost estimates from NEC America, Inc., and Harris Corporation and also had the assistance of communications counsel in preparing estimates of three months' operating expenses. The cost estimates arrived at by JAM appear reasonable and adequate.[2]

6. JAM proposes to meet its estimated costs of construction and operation with a bank loan in the amount of $5 million from the Deposit Guaranty National Bank, a Mississippi lending institution. In this connection, a bank letter under date of January 19, 1987, was secured by Peoples and was available at the time he executed JAM's application and certified the applicant's financial qualifications. Thereafter, communications counsel for JAM requested the bank to revise its letter and, subsequently, a revised bank letter of July 23, 1987, was secured by JAM. This letter was supplemented by a further letter from the bank dated October 5, 1989.

7. The January 19, 1987, bank letter provided that Deposit Guaranty National Bank (DGNB) "will be willing to consider your application for loans to your company in sums of $5 million for the construction and operation of the station." The terms of the loan would "be negotiated on the basis of the circumstances at the time you request them." The loan would be for a term "not more than ten years" with "interest at an appropriate rate" with repayment beginning at a time "mutually agreed upon." The loans would be "subject to the customary credit criteria of this bank and to the execution of loan and security agreements satisfactory to the bank and to your company."

8. JAM decided to approach Deposit Guaranty National Bank for its bank letter because both Peoples and JAM's local legal counsel knew E. B. Robinson, the chief executive officer of the Deposit Guaranty National Bank, very well. Peoples got to know Robinson when Peoples was president of Jackson State University and invited Robinson in 1979 or 1980 to serve on the Board of Directors of Jackson State University Development Foundation. Peo-

ples worked with Robinson on various fund raising projects. Counsel knew Robinson because his law firm had represented Deposit Guaranty National Bank for many years.

9. The July 23, 1987, bank letter was more specific. It stated that the Deposit Guaranty National Bank "will be willing to receive and act upon your application for loans." The interest rate "if advanced today" would be "either Prime plus 1 3/4% Floating or 10 3/4% Fixed for three years." During construction, interest only would be payable with payments of principal and interest to commence after the station is completed and in operation. The letter reiterated "[a]lthough this is not a commitment to lend on the part of the bank, we look forward to receiving from you a definite application for the loans contemplated in this letter."

10. The October 5, 1989, letter from the Deposit Guaranty National Bank reaffirms its prior letters and states that it is "strongly interested in receiving and acting upon loan requests from your group." Moreover, the bank "would be most pleased to assist the establishment of a new television station at Jackson under the ownership and management of your group if we find it possible and prudent to do so." The letter further states that "we will be willing to make the loans subject to our satisfaction with the economic circumstances at the time the loans are requested, your compliance with our customary credit criteria, and the execution of loan and security agreements satisfactory to us." As to appropriate security, it states that "assuming cash investments by the owners in amounts which we then consider to be adequate,[3] we believe that it is clearly possible that the new television station, as an ongoing enterprise, could serve as adequate collateral for the sums you will need." The bank also states that its lending limit exceeds $5 million.

11. In further support of its request for summary decision on the financial issue, JAM has submitted appropriate affidavits from, *inter alia*, its principals, its bankers, and its legal counsel. It is clear, therefrom, that the bank letter upon which JAM relies is a *bona fide* and good faith expression on the part of the Deposit Guaranty National Bank to enter into an arrangement to lend funds to JAM, and it provides the applicant with reasonable assurance that the necessary funds will be available for it to build and operate its proposed station. Additionally, JAM has submitted financial statements of its three principals, as well as a corporate balance sheet as of the date JAM's application was filed. As previously noted in the Preliminary Statement, this information was requested by the Review Board. It appears from this information that JAM had assets of $9,000 as of January 21, 1987. Peoples' financial statement indicated a net worth of $1,045,354; Hilda C. Jones' financial statement indicated a net worth of $350,761; and Mavis James' financial statement indicated a net worth of $313,000. However, it must be emphasized that the principals of JAM were not relying on their own personal assets to meet construction and operating costs at the time their application was filed, and Peoples did not review the personal financial statements of the principals of JAM prior to certifying that JAM was financially qualified. This action was appropriate, however, because JAM was not relying on the individual principals as the source of its financing, but rather on bank financing.

## ULTIMATE FINDINGS AND CONCLUSIONS

12. The bank letters and affidavits submitted by JAM in support of its motion for summary decision meet the Commission's standard of establishing reasonable assurance of the availability of bank financing. The Commission has stated that "[a] *present firm* intention to make a loan, future conditions permitting, is the essence of our 'reasonable assurance' standard." *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980); *see also, Dutchess Communications Corp.*, 101 FCC 2d 243, 249 (1985). The bank letters secured by JAM meet the Commission's requirement of demonstrating a present firm intention on the part of the bank to make a loan, future conditions permitting. Furthermore, the bank letters contain the necessary information concerning interest rates, loan duration, repayment terms, and security. Letters from the Deposit Guaranty National Bank state the bank's intention to make a final decision on the loan based on the situation as it exists at the time JAM receives a grant, the same type of letter that was deemed sufficient in *Multi-State Communications, Inc.* v. *FCC*, 590 F. 2d 1117 (D.C. Cir. 1978). The bank letter provides JAM with reasonable assurance of the availability of a bank loan in the amount of $5 million. Because this sum is in excess of the estimated $4,393,074.29 needed to build and operate the station for three months assuming no revenue, the applicant has shown it is financially qualified.

13. Section 1.251 of the Commission's rules provides for summary decision where there is no genuine issue of material fact for determination at hearing. *New Broadcasting Corp.*, 44 FCC 2d 386 (1973). To support a motion for summary decision, the moving party must demonstrate that no genuine issue of material fact remains and that it is otherwise entitled to summary decision. This requires a showing that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 50 FCC 2d 967 (1975). JAM has met its burden on the strength of the affidavits it has submitted from its principals, bankers, legal representative, and the bank letters establishing reasonable assurance of the availability of sufficient funds to meet estimated construction and operating expenses. The Presiding Judge agrees with the Bureau's evaluation that a hearing on the financial issue would serve no useful purpose, and that JAM is entitled to summary decision on such issue.

Accordingly, IT IS ORDERED that the "Supplement and Motion for Leave to File" filed by JAM Communications, Inc., on October 10, 1989, IS GRANTED, and the supplement IS ACCEPTED;

IT IS FURTHER ORDERED, that the unopposed "Motion for Summary Decision," as supplemented on October 10, 1989, IS GRANTED, and the financial issue IS RESOLVED in favor of JAM;

IT IS FURTHER ORDERED that the application of JAM Communications, Inc. (File No. BPCT-870121KF) for a construction permit for a new television station in Jackson, Mississippi, IS GRANTED.[4,5]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

## FOOTNOTES

[1] An "Errata" to the motion for summary decision was filed by JAM on September 22, 1989.

[2] *Dubois County Broadcasting*, 53 FCC 2d 828 (1975).

[3] Each of the three JAM principals have paid $4,000 for stock and have subscribed for $16,500 of additional stock. Each principal has also agreed to lend JAM up to $79,500. Thus, it appears that each principal would be obligated to contribute $100,000 to JAM.

[4] The Presiding Judge originally preferred the JAM application in the Initial Decision (FCC 88D-34) released October 26, 1988. However, as noted in the Preliminary Statement, subsequent to the release of the Initial Decision, the Review Board, on its own motion, specified a financial issue against JAM.

[5] In the event that exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 48 C.F.R. 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-260**

In the Matter of

Amendment of Section 73.202(b) RM-5728
Table of Allotments
FM Broadcast Stations
(Olive Branch, Mississippi)

## MEMORANDUM OPINION AND ORDER

**Adopted: October 19, 1989; Released: November 7, 1989**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for reconsideration filed by Sudbury Services, Inc., directed against the *Report and Order* in this proceeding, 3 FCC Rcd 3131 (1980), allotting Channel 239A to Olive Branch, Mississippi. Olive Branch Broadcasting Company filed an opposition to the petition for reconsideration. Gazelle Broadcasting Co., Inc., filed an opposition to petition for reconsideration and a motion for acceptance of its opposition.[1] Sudbury Services, Inc., filed a reply to the opposition to the petition for reconsideration filed by Olive Branch Broadcasting Company and an opposition to the motion for acceptance filed by Gazelle Broadcasting Co., Inc. For the reasons discussed below, we are granting the petition for reconsideration to the extent of permitting Sudbury Services, Inc. to amend its pending application for Station KHLS, Blytheville, Arkansas.

## BACKGROUND

2. In order to put the present matter in perspective, it is first necessary to provide a background of the relevant Commission actions in BC Docket No. 80-90. In BC Docket No. 80-90, the Commission created additional classes of FM channels with new station separation requirements. *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Assignments*, 94 FCC 2d 152 (1983); *recon.* 97 FCC 2d 279 (1984). BC Docket No. 80-90 also provided that Class B and Class C stations that did not operate with prescribed minimum facilities would be automatically downgraded (*e. g.* Class C to Class C1) on March 2, 1987. As part of the implementation of BC Docket No. 80-90, stations with licenses or construction permits in existence on March 1, 1984, were given until March 2, 1987, to file an application to specify minimum Class B or Class C facilities or be reclassified according to their actual facilities. The Commission also stated that it was not its intention to overly restrict the ability of a station to file the necessary application specifying minimum facilities within the 3-year period. To this end, the Commission afforded Class C stations operating with less than the prescribed minimum Class C facilities a 16-kilometer "buffer zone." Thus, all petitions for rule making for FM allotments filed after March 1, 1984, were required to meet the minimum distance separations set forth in Section 73.207 of the Commission's Rules *plus* an additional 16 kilometers to existing Class C stations with the buffer zone. This buffer zone protection remained in effect until March 2, 1987.

3. Against this background, we turn to the facts of this case. J.J. Kirk filed a petition for rule making proposing the allotment of Channel 239A to Olive Branch, Mississippi, on February 3, 1987. This petition for rule making complied with the minimum spacing requirements for all existing FM stations. However, this petition was short-spaced to the 16-kilometer buffer zone for Station KHLS, Channel 242C, Blytheville, Arkansas. Even though the proposed Channel 239A allotment at Olive Branch met the minimum spacing requirements with respect to the existing Class C1 facilities at Station KHLS and a full Class C allotment at the present Station KHLS site, it was subject to being returned for failing to afford Station KHLS protection to its 16-kilometer buffer zone. However, during the time that Kirk's petition was being processed by the staff, and before the short-spacing to the buffer zone was discovered, the buffer zone expired. In the meantime, on February 24, 1987, Sudbury Services, Inc. ("Sudbury"), licensee of Station KHLS, filed an application proposing minimum Class C facilities (File No. BPH-870224IW). This application proposed a site 32 kilometers from the existing site of Station KHLS and outside the protected 16-kilometer buffer zone.

4. On July 9, 1987, we adopted a *Notice of Proposed Rule Making* in MM Docket No. 87-260, proposing the allotment of Channel 239A to Olive Branch, Mississippi. 2 FCC Rcd 4347 (1987). In that *Notice*, we specifically noted that Channel 239A at Olive Branch, with a site restriction of 2.5 kilometers, protected Station KHLS, Channel 242, Blytheville, Arkansas. Subsequently, on April 29, 1988, the *Report and Order* in this proceeding allotted Channel 239A to Olive Branch. In doing so, the *Report and Order* noted that this Olive Branch allotment would protect both the existing licensed facilities of Station KHLS specifying Class C1 facilities and the outstanding Station KHLS construction permit, also specifying Class C1 facilities (File No. BMPH-860710IC). In regard to the pending application of Sudbury proposing full Class C facilities for Station KHLS, the *Report and Order* stated that this application was not entitled to protection because it specified a site outside of the 16-kilometer buffer zone. The allotment of Channel 239A to Olive Branch precludes grant of this application.

5. In support of its petition for reconsideration, Sudbury contends that the Olive Branch petition for rule making should have been summarily rejected for failing to protect the 16-kilometer buffer zone of Station KHLS. Also, Sudbury notes that the *Notice* in this proceeding made no reference to the Station KHLS application to maintain full Class C status. As such, Sudbury asserts that we did not afford it the requisite notice that its application would be adversely affected. Finally, Sudbury argues that Channel 239A was allotted to Olive Branch under the mistaken belief that KHLS was a Class C1 station, and when considering Station KHLS as a full Class C station, the Olive Branch allotment does not comply with the Commission's minimum spacing requirements. We consider the arguments advanced by Sudbury seriatim.

## DISCUSSION

6. Kirk filed the Olive Branch petition for rule making prior to the expiration of the 16-kilometer buffer zone. Such rule making petitions were routinely returned without prejudice to the petitioner refiling the rule making petition on or after March 3, 1987, after the expiration of the buffer zone. In the present case involving the Olive Branch rule making petition filed February 3, 1987, the short-spacing to the buffer zone was not discovered until after the buffer zone had expired. In view of the fact that the buffer zone had expired, we saw no purpose in returning the petition when it could have been immediately refiled. Therefore, we treated the petition as if filed on March 3, 1987.

7. Our action allotting Channel 239A to Olive Branch did not contravene the notice provision of Section 553(b) of the Administrative Procedure Act, 5 U.S.C. 553(b). Sudbury was afforded the requisite notice that its application outside of the buffer zone would not be protected by rule making petitions to amend the Table of FM Allotments. The *Report and Order* in BC Docket No. 80-90 indicated that new allotments would be made based on the present location of existing stations. *See* Section 73.208(a)(1) of the Commission's Rules. Subsequently, in the *Memorandum Opinion and Order* released March 13, 1984, 49 Fed. Reg. 10260, published March 20, 1984, the Commission specifically noted the concerns expressed by several parties that during the interim period prior to March 2, 1987, allotments could be made that would limit the ability of FM stations to upgrade to minimum Class C facilities. The Commission recognized that such matters as land availability, local zoning restrictions, or FAA restrictions, could, in fact, preclude an existing station from upgrading its facilities at its present site. In view of this concern, the Commission established the 16-kilometer buffer zone, thereby providing additional flexibility of movement for Class C FM stations. The effect of this action was to temporarily modify Section 73.208(a)(1) of the Rules to require the Olive Branch rule making petition to protect both the Station KHLS transmitter site as a full Class C station *and* the 16-kilometer buffer zone for Station KHLS.[2] There is nothing in the *Memorandum Opinion and Order* or the Commission *Public Notice* released April 9, 1985, to suggest that the Commission would further modify Section 73.208(a)(1) of the Rules to protect a preferred site outside of the buffer zone. Inasmuch as the Olive Branch proposal was not required to protect the proposed Station KHLS site outside of the buffer zone, there was no requirement that the *Notice* in this proceeding specifically alert Sudbury that its application is not entitled to protection and would not be afforded protection in this rule making proceeding.

8. The allotment of Channel 239A to Olive Branch is not short-spaced to Station KHLS. In view of the pendency of the Station KHLS application specifying minimum Class C facilities, Channel 242 at Blytheville, Arkansas, remains a full Class C allotment even though Station KHLS is operating with Class C1 facilities. In this instance, the Class C allotment is protected to the extent of permitting Sudbury to amend its application to a site complying with the minimum separation requirements and/or interference protection criteria. As discussed earlier, the Station KHLS application site outside the protected buffer zone is not entitled to protection from petitions for rule making. In addition, the licensed site of Station KHLS is entitled to protection, and that protection will be afforded as a Class C1 station. Even if we were to protect Station KHLS as a Class C allotment at its licensed site, as suggested by Sudbury, the Olive Branch allotment complies with the minimum spacing requirements. [3] In this regard, Section 73.207(b) of the Rules required, at the time the Olive Branch rule making was filed, a minimum spacing of 105 kilometers between a Class A station and a third-adjacent Class C station. In the present case, the separation between the Class A allotment at Olive Branch and the licensed site of Station KHLS is 104.79 kilometers. In accordance with Section 73.208(c)(8) of the Rules, this distance is rounded to the nearest kilometer. Consequently, the distance between the Channel 239A allotment at Olive Branch and Station KHLS is 105 kilometers, in compliance with the version of Section 73.207(b) of the Rules in effect at the time the Olive Branch petition for rule making was filed.

9. Accordingly, the aforementioned petition for reconsideration filed by Sudbury Services, Inc., IS GRANTED to the extent indicated above and IS DENIED in all other respects.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

## FOOTNOTES

[1] On July 5, 1988, Sudbury filed its petition for reconsideration. Notice was published in the Federal Register on August 5, 1988, 53 Fed. Reg. 29522. In accordance with Section 1.429(f) of the Rules, oppositions were due on August 22, 1988. Gazelle filed its opposition to the petition for reconsideration on September 12, 1988. In support of its "Motion for Acceptance of Late-Filed Opposition," Gazelle states that additional time was necessary because counsel was away from the office on vacation, other counsel and engineers were occupied with the preparation of the application for the Olive Branch allotment, and the petition for reconsideration raises important public interest concerns which could affect the eleven applicants for the Olive Branch allotment. The Gazelle motion is hereby denied. Counsel's vacation schedule and inadequate staffing do not constitute sufficient justification for waiver of Section 1.429(f) of the Rules. Moreover, Gazelle has not advanced any specific public interest reasons to justify favorable action on its motion. Accordingly, the opposition to the petition for reconsideration filed by Gazelle will not be considered in this proceeding.

[2] Section 73.208(a)(1) of the Rules requires a petition for rule making to amend the Table of FM Allotments to protect authorized transmitter sites. Once the channel is allotted, Section 73.208(b)(4) requires, at the licensing stage, an applicant for the allotment to protect pending applications in other communities. There is no parallel requirement in Section 73.208(a) that a petition for rule making also protect pending applications.

[3] In view of our action allotting Channel 239A to Olive Branch, we will permit Sudbury to amend its application without loss of cut-off protection. On July 13, 1989, the Commission

adopted a *Second Report and Order* in MM Docket No. 88-375; 4 FCC Rcd 6375 (1989). In that *Second Report and Order,* the Commission reduced the minimum separation requirement between a Class A station and a third adjacent Class C station from 105 to 95 kilometers. In the present case, the effect of that action is to afford Sudbury additional flexibility in regard to any amendment of its pending application.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-289**

In the Matter of

Amendment of Section 73.202(b), RM-5389
Table of Allotments,
FM Broadcast Stations.
(Santa Margarita and
Guadelupe, California)

**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 17, 1989; Released: November 7, 1989**

By the Chief, Policy and Rules Division:

1. Before the Commission is the Application for Review filed by Reimer Broadcasting, Limited ("RBL") of a *Report and Order*, 2 FCC 2d 6930 (1987), issued by the Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau ("Bureau"). RBL requests that the Commission review the actions taken in the *Report and Order*, which granted a petition by Mid-Coast Radio, Inc. ("Mid-Coast"), permittee of Station KWSP(FM) ("KWSP"), Santa Margarita, California, to substitute Channel 291B1 for Channel 292A at Santa Margarita and to modify its permit accordingly. The *Report and Order* also denied the counterproposal of Armando Garcia ("Garcia") to substitute Channel 290B1 for Channel 288A at Guadelupe, California.[1] RBL had filed comments supporting Garcia's request. Garcia did not file a Petition for Reconsideration or an Application for Review of the *Report and Order*.

2. Also before the Commission is a Petition for Reconsideration, filed by Double D Broadcasting Company ("Double D"), permittee of Station KRAB(FM) ("KRAB"), Channel 291A, Green Acres, California, of the *Report and Order* in this proceeding. Mid-Coast filed an Opposition to the Petition for Reconsideration. Armando Garcia, an original proponent of the upgrade to the allotment at Guadelupe, filed a Petition For Leave To File Supplement to Petition For Reconsideration and a Supplement To Petition For Reconsideration. Mid-Coast filed an Opposition To Petition To File Supplement To Petition For Reconsideration. Garcia filed a Petition For Leave To File Reply and a Reply. Subsequently, Double D filed a Supplement to Petition for Reconsideration.

**BACKGROUND**

3. RBL and Garcia were the two applicants for a construction permit for Channel 288A at Guadelupe. *See* MM Docket 85-298. On July 10, 1987, an Administrative Law Judge issued an Initial Decision granting Garcia's application. *See* 2 FCC Rcd 4166 (1987). RBL filed exceptions. On November 9, 1987, the Review Board issued a *Memorandum Opinion and Order* that required Garcia to submit various financial evidence. *See* 2 FCC Rcd 6845 (Rev. Bd. 1987). On March 7, 1988, the Review Board issued a *Decision* granting Garcia's application and denying RBL's application. *See* 3 FCC Rcd 1065 (Rev. Bd. 1988). RBL filed an Application for Review of that decision. In an *Order* issued on August 8, 1988, we denied RBL's Application for Review. *See* 3 FCC Rcd 4767 (1988). RBL sought judicial review of that Order in the U.S. Court of Appeals for the District of Columbia Circuit. *See Reimer Broadcasting, Limited v. FCC*, No. 88-1659 (filed September 8, 1988). At the request of the parties, the Court of Appeals remanded the proceeding to the Commission for consideration of a settlement agreement between RBL and Garcia. The Commission granted the settlement agreement, and that action is no longer subject to review. *See Order*, FCC 89I-51 (released August 8, 1989).

4. On August 26, 1986, prior to the *Initial Decision* in the( Garcia/RBL comparative hearing, Garcia sought to upgrade his proposed facilities pursuant to the adjacent channel provision of Section 1.420(g)(3) of the Commission's Rules, whereby the Commission may modify the license or permit of an FM station to another class of channel if the modification of license or permit would occur on a higher class adjacent or co-channel. When Garcia filed his adjacent-channel counterproposal pursuant to Section 1.420(g)(3), he was an applicant for the Channel 288A permit, not a licensee or permittee. Garcia argued that the adjacent channel upgrade procedure should be applied to applicants as well as permittees and licensees.[2] Both RBL and Garcia objected to an upgrade of the new allotment at Guadelupe if competing applications would be entertained for the upgraded allotment.

5. The Bureau rejected Garcia's counterproposal. It reasoned that the terms of Section 1.420 do not mention applicants, and therefore the benefits of adjacent channel upgrade proceedings do not accrue to applicants. The Bureau noted that in adopting Section 1.420(g)(3), the Commission stated that Section 316 "authorizes the Commission to modify station *licenses* where the public interest is thereby promoted." [3] The Bureau concluded that Section 316 revealed no authority to modify an *application*, and that the Commission's modification authority is expressly limited to station licenses and construction permits. Garcia has not timely contested that determination.

6. Prior to the filing of its Petition for Reconsideration, Double D was not a party to this proceeding. However, on October 7, 1987, long after the August 25, 1986, initial comment deadline in this proceeding, Double D filed a counterproposal in a separate proceeding, MM Docket 87-332, proposing the upgrade of its station KRAB at Green Acres, California, from Channel 291A to Channel 291B1. Double D's purpose in seeking reconsideration in this proceeding is to facilitate, by imposing a site restriction on the Santa Margarita allotment,[4] its proposal in MM Docket 87-332.[5] In Docket 87-332, the Commission proposed the substitution of Channel 237B1 for Channel 237A at Oildale, California, and the concomitant modification of the license for station KLLY(FM).

7. Double D seeks reconsideration pursuant to Section 1.429(b) of the Commission's Rules. That Section states that petitions for reconsideration relying on facts not previously presented to the Commission will be granted only if: 1) the facts relied on relate to events which have occurred or circumstances which have changed since the

last opportunity to present them to the Commission; 2) the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or 3) the Commission determines that consideration of the facts relied on is required in the public interest. Double D argues that the facts it relies on relate to an event which has occurred since its last opportunity to present those facts. Specifically, Double D argues that it first acquired the construction permit for Station KRAB on September 16, 1987, approximately one year after the comment and reply comment deadlines in this proceeding.[6] Double D further contends that it could not have submitted its site restriction proposal in a timely manner in this proceeding because it was not until after September 16, 1987, that it became aware of the need to implement its KRAB upgrade by imposing a site restriction on KWSP. In addition, Double D contends that it would serve the public interest to impose the site restriction on KWSP because to do so would facilitate the upgrades of two Class A stations, KRAB and KLLY, rather than only one, KLLY.

8. Double D also relies on a number of facts presented in the proceeding where it first filed its counterproposal, MM Docket 87-332. Double D states that it filed a counterproposal in Docket 87-322 that meets the Commission's station separation requirements to the upgraded channel at Santa Margarita. As a consequence, states Double D, unless a special coverage prediction method is used, its counterproposal does not comply with the Commission's city grade coverage requirements. Double D argues that, if the special coverage prediction method it suggests is not used, or, alternatively, if a site restriction is not imposed on the Santa Margarita allotment, it may not be able to upgrade KRAB.

9. In its opposition, Mid-Coast argues that Double D's petition for reconsideration is procedurally defective. Mid-Coast argues that Double D's petition for reconsideration is tantamount to an untimely counterproposal is this proceeding, and that consideration of the counterproposal is barred by the express terms of the NPRM in this proceeding. Mid-Coast also argues that Double D's petition for reconsideration violates Section 1.429 of the Commission's rules. Mid-Coast notes that there has been no change in any material fact since the comment date in this proceeding, and that any potential proponent of an upgrade to KRAB was on full notice of the potentially mutually exclusive allotment at Santa Margarita as of the comment date in this proceeding. Mid-Coast characterizes Double D's claim that a change in KRAB's ownership justifies reopening this proceeding as "mystifying," and argues that Double D should not acquire any special rights simply because its predecessor in interest failed to participate in this proceeding. Mid-Coast also argues that, even if Double D was not aware of the potential conflict between its desire to upgrade and the Santa Margarita upgrade proposal, it was nonetheless on notice of those facts as early as July of 1986.

10. Mid-Coast also argues that consideration of the site restriction proposed by Double D would not serve the public interest, because the site restriction would make it impossible for Mid-Coast to provide a city grade signal to Santa Margarita. Mid-Coast notes that Santa Margarita lies in a valley. To its west lies the Santa Lucia Mountain range, and west from the Santa Lucia Range, the Pacific coast. According to Mid-Coast, the site restriction requested by Double D would require it to construct a tower in the coastal areas to the west of the Santa Lucia Range. From that area, argues Mid-Coast, a tower of no less that 1,550 feet height would equal the elevation of the Santa Lucia Mountains, but would still not provide line of sight coverage to Santa Margarita, which lies approximately 1,000 feet below the crest of the Santa Lucia range on the eastward side of the range. Mid-Coast also argues that, even if a tower tall enough to provide adequate coverage to Santa Margarita were theoretically possible, environmental and FAA concerns would prevent its construction.

11. Double D did not reply to Mid-Coast's opposition. Approximately eight months after the close of the pleading cycle, however, Garcia filed a petition for leave to file a supplement and supplement to Double D's petition for reconsideration. In its petition for leave to supplement, Garcia argues that our denial of RBL's application for review of the grant of Garcia's application for Channel 288A at Guadelupe constitutes a changed circumstance warranting acceptance of its supplement.

12. Mid-Coast opposed Garcia's petition for leave to file a supplement, arguing that the supplement submitted constitutes a petition for reconsideration, and that the petition for reconsideration violates Section 405 of the Communications Act because it was not filed within thirty days after the date of the public notice of the Bureau's *Report and Order*. *See* 47 U.S.C. § 405.

13. In a reply to Mid-Coast's opposition, Garcia expressly states that the supplement is not an attempt to seek reconsideration. However, Garcia argues that our action denying RBL's application for review in the comparative hearing is a "materially relevant" Commission action. Garcia also argues that he has not waived his rights to seek review. Garcia notes that, pursuant to Section 1.104(b) of the Commission's rules, a person desiring Commission consideration of a final action taken pursuant to delegated authority is required to submit either a petition for reconsideration or an application for review within thirty days from the date of public notice of such action. Garcia argues that the Bureau *Report and Order* was not a "final" action, because Double D filed a petition for reconsideration of the Bureau *Report and Order*, thereby staying its effectiveness pursuant to Section 1.429 (d) of our rules.

14. Subsequently, Double D submitted a Supplement to Petition for Reconsideration. Double D also informs the Commission that the award to Garcia of the construction permit for Channel 288A at Guadelupe is now effective. It contends that because Garcia has become a permittee, the Commission should now consider the option of upgrading the allotment at Guadelupe. Double D further submits that if the Commission selects the Guadelupe upgrade over the Santa Margarita upgrade, there would be no basis for refusing Double D's request for an upgrade of Station KRAB, and the issue of a site restriction on the Santa Margarita allotment would be moot.

15. In support of its contention that the Commission is obliged to consider Garcia's proposed upgrade at Guadelupe, Double D cites *Golden State Broadcasting Corp.*, 102 FCC 2d 797 (1985), in which we held that the grant, after the close of the record in a comparative licensing proceeding, of several construction permits in other proceedings, which, if considered, would obviate a

dispositive reception service preference to one of the mutually exclusive applicants before us, was a change in core circumstances requiring a different result.

## DISCUSSION

16. As a threshhold matter, we will dismiss RBL's Application for Review. With the approval of the settlement agreement between RBL and Garcia, RBL's application was dismissed. That dismissal is now no longer subject to review. Because RBL is no longer an applicant for the Guadelupe allotment, RBL no longer has any interest in the outcome of this proceeding. Accordingly, RBL's Application for Review will be dismissed.

17. After careful consideration of the pleadings, we will deny Double D's Petition for Reconsideration. The fact that the grant of Garcia's construction permit has now become effective is irrelevant. In any event, and contrary to Garcia's contentions, Garcia has waived his right to seek review of the Bureau's action.[7] Double D cannot rely on the potential grant of an upgrade to Garcia, when Garcia has waived any right to pursue that upgrade in this proceeding.[8] Accordingly, we will not consider the supplements premised on the effectiveness of the grant of Garcia's application. We limit the following discussion to those arguments raised in Double D's petition for reconsideration and Mid-Coast's opposition.

18. We agree with Mid-Coast's contention that Double D's petition for reconsideration is procedurally defective because it does not satisfy any of the three prongs of Section 1.429 of our rules. We find that Double D is not entitled to reconsideration under Section 1.429(b)(1) of our rules. This subsection allows consideration of facts not previously presented if the facts relied on relate to events or circumstance which have changed since the last opportunity to present them to the Commission. The only fact relied on in Double D's petition for reconsideration that changed after the date for filing initial comments in this proceeding was the ownership of Station KRAB. Admittedly Double D could not have advanced a counterproposal for the upgrading of KRAB by the initial comment deadline, because it was not at the time the licensee of KRAB. The previous licensee, however, was free to do so. The previous licensee failed to submit a timely counterproposal. If it had subsequently tried to file a counterproposal, its proposal would have been barred by our allotment cut-off rules [ *See* 47 CFR § 1.420(d)] and by the express terms of the NPRM in this proceeding. There is no basis for granting Double D any greater right to reconsideration than the previous licensee would have had. To grant such a right would prejudice all parties who complied with comment dates, would prolong resolution of allotment proceedings and would unreasonably delay provision of service.

19. Double D is also not entitled to reconsideration under Section 1.429(b)(2) of the Commission's rules. This subsection permits consideration of facts not previously presented only if the facts relied on were unknown to the petitioner until after his last opportunity to present them to the Commission, and the petitioner could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity. Although both Double D and the previous licensee of KRAB were apparently not aware of the conflict between an upgrade for KRAB and the Santa Margarita upgrade proposal, that conflict could have been discovered through the exercise of ordinary diligence.

20. Finally, Double D is not entitled to reconsideration under Section 1.429(b)(3). This subsection permits consideration of facts not previously presented only if consideration of the facts relied on would serve the public interest. Commission engineering analysis confirms Mid-Coast's contention that the site restriction which Double D seeks would require Mid-Coast to place its transmitter at a location where a mountain range would intervene between the restricted site and Santa Margarita. This restriction would effectively prevent the construction of Class B1 facilities that would provide Santa Margarita with a city-grade signal, as required by Section 73.315. Waiver of that Section in these circumstances is clearly contrary to the public interest.

21. Accordingly, IT IS ORDERED, that the Petition For Reconsideration filed by Double D Broadcasting Company IS DENIED.

22. IT IS FURTHER ORDERED, that the Application For Review submitted by Reimer Broadcasting, Limited, IS DISMISSED.

23. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

24. For further information concerning this proceeding, contact Belford V. Lawson, Mass Media Bureau, (202)634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

## FOOTNOTES

[1] Garcia's counterproposal was mutually exclusive with that of Mid-Coast. The Channel 290B1 allotment at Guadelupe would be separated from a Channel 291B1 allotment at Santa Margarita by 56.7 kilometers, whereas Section 73.207 of the Rules requires a 114 kilometer separation.

[2] The status of an applicant is different from that of a petitioner. A petitioner is an interested party who petitions the Commission to issue a Notice of Proposed Rule Making proposing to amend the FM or TV Tables of Allotments by allotting a channel of a specific class to a community. In general, a petitioner or other interested party formally becomes an applicant by filing an application for a newly allotted channel. Ordinarily, a petitioner who proposes the allotment of a channel will proceed to file an application for the construction permit to operate on that channel. A permittee or licensee who petitions for allotment of a channel must file an application for that channel and compete against other applicants if the channel is one for which Commission Rules require competition. However, under limited circumstances set forth in Section 1.420 of the Commission's rules, permittees and licensees, but not applicants, are exempted from such competition.

[3] *Amendment of the Commission's Rules Regarding Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels*, 60 RR 2d 114, 119 (1986) (emphasis supplied) (" *FM Adajcent and Co - Channel Upgrades* ").

[4] With the site restriction Double D requests, the Santa Margarita station's transmitter antenna site would be relocated to a point approximately 19.3 kilometers west of the Santa Margarita reference point.

[5] Double D's counterproposal in Docket 87-332 was returned by letter as unacceptable for failure to comply with the city-grade coverage requirements of Section 73.315 of the Commission's Rules. The proposal for an upgrade at Oildale was granted. Double D has separately filed a Petition for Reconsideration of the *Report and Order*, 3 FCC Rcd 5223 (1988), in the Oildale proceeding.

[6] On that date, the Commission consented to the assignment to Double D of the construction permit for Station KRAB. *See* BPH-841231MI.

[7] Although Garcia correctly contends that Double D's petition for reconsideration stayed the *effectiveness* of the Bureau *Report* and Ord er, by operation of Section 1.420(f) of our rules, the filing of a petition for reconsideration does not negate *finality* for purposes of the deadlines for seeking review. *Compare* 47 CFR § 1.103(a) with 47 CFR § 1.103(b). For purposes of Section 1.104(b) of our rules, an action is considered final on the date of "public notice" as defined in Section 1.4. *See* 47 CFR § 1.103(b). Accordingly, the filing of a petition for reconsideration by Double D did not relieve Garcia of his obligation to file either an application for review or a petition for reconsideration within thirty days after the date of public notice of the Bureau *Report and Order*.

[8] Double D argues that, in light of the effectiveness of the grant of Garcia's construction permit, we are compelled to consider the upgrade of the Guadelupe allotment under the rationale in *Golden State*. We find *Golden State inapposite*. In *Golden State*, the Commission initially awarded one of several applicants a preference for proposing reception service to an underserved area. The other applicants sought review. While the case was under review, the Commission separately granted unrelated applications for stations to serve the underserved area. When this fact was brought to our attention, we declined to award the preference, even though the initial grant was proper. In *Golden State*, the parties that benefitted directly from consideration of the change in circumstances, unlike Garcia in this case, had filed timely pleadings requesting review of the earlier decision. Moreover, *Golden State* did not involve circumstances in which a proposal ineligible for consideration at the time filed arguably became eligible for consideration after relevant cut-off dates for the filing of such proposals. Where, as here, such circumstances are present, our concerns with finality and with an orderly administrative process are greater.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY Revisions to Tariff F.C.C. No. 1 — Transmittal No. 1794

**ORDER**

**Adopted: October 27, 1989; Released: October 27, 1989**

By the Chief, Common Carrier Bureau:

1. On September 15, 1989, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1794, to introduce a new half-hour option to AT&T's family of REACH OUT America calling plans. US Sprint Communications Company Limited Partnership (US Sprint) filed a petition to suspend the proposed tariff revisions, and AT&T replied. Transmittal 1794 is scheduled to become effective October 30, 1989.

2. AT&T's REACH OUT America calling plans allow subscribers to make an unlimited number of direct dial long distance calls within a limited block of time during a particular time period for a flat fee. Under this AT&T transmittal, customers will pay a monthly recurring charge of $4.35 for 30 minutes of night/weekend interstate direct dial calls. AT&T will also charge customers 12 cents per minute for night/weekend usage in excess of the half-hour time block. In addition, AT&T plans to offer subscribers a 10 percent discount on interstate direct dial calls during the evening rate period. AT&T states that the $4.35 charge is slightly more than half of the $8.15 price of the REACH OUT America Bonus Plan, which offers one hour of night/weekend calling and a 15 percent discount on evening calls.[1]

3. AT&T states that it employed an independent consulting firm to conduct a market study to provide data from which it could determine the effect of the half-hour plan on demand and revenues. Based on this market study and on its own analysis of that study, AT&T believes that the proposed half-hour calling plan will reduce REACH OUT America revenues by a total of $3 million.[2] AT&T states that the new actual price index (API) resulting from the proposed rate changes falls below the price cap index (PCI) for Basket 1, which includes AT&T's residential and small business services. It also claims that the new service band index (SBI) for the Reach Out band falls within the "no-suspension" zone set forth in Section 61.47(e) of the Commission's Rules. AT&T also states that the proposed half-hour option produces no change in the average residential rate index.[3]

4. US Sprint disputes AT&T's interpretation of the Commission's price cap rules. US Sprint argues that AT&T's offering constitutes a new service, and not a rate restructure for purposes of the price cap rules. As such, US Sprint argues that AT&T must follow the requirements of Section 69.49(g) of the Commission's Rules, 47 C.F.R. § 69.49(g), and justify the half-hour calling plan pursuant to the net revenue test. US Sprint believes AT&T's transmittal fits squarely within the price cap definition of a new service, since it adds to the range of options available to customers. US Sprint states that when a service has been restructured, the previous version of that service no longer exists.[4] While it believes AT&T's failure to comply with the price cap rules provides adequate grounds for rejection of this offering, it requests that the Commission suspend the tariff for one day and direct AT&T to provide the requisite cost support material.[5]

5. In its reply comments, AT&T maintains that its treatment of the half-hour plan as a restructure is consistent with past filing practices authorized by the Commission. It argues that the half-hour option constitutes the creation of an optional rate element within the existing REACH OUT America service. In AT&T's view, the instant transmittal merely unbundles the current hourly block of time into half-hour portions.[6] Nevertheless, in an attachment to its reply, AT&T supplies a net revenue analysis, which demonstrates that the half-hour plan recovers its costs and increases net revenues.[7]

6. The Common Carrier Bureau has reviewed Transmittal 1794 and the associated pleadings, including the net revenue showing in the AT&T reply. We conclude that no compelling argument has been presented that warrants investigation of AT&T's tariff at this time.[8]

7. Accordingly, IT IS ORDERED that the petition filed by US Sprint Communications Company Limited Partnership in the above-captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] AT&T Description and Justification at 2.

[2] *Id.* at 3-4.

[3] *Id.* at 4.

[4] US Sprint Petition at 2.

[5] *Id.* at 3.

[6] AT&T Reply at 2-3.

[7] *Id.* at Appendix A.

[8] We note that AT&T has misinterpreted the Commission's price cap rules. AT&T incorrectly filed an adjusted API for Basket 1 and an adjusted SBI for the REACH OUT America service category. The introduction of a new service does not result in adjustments to these indices because new services are not immediately included in AT&T's baskets. *See* 47 C.F.R. § 61.42(d). We require AT&T to file supplementary API and SBI calculations showing that no changes to those indices have resulted from this new REACH OUT option. In addition, we stress that when new services are introduced, the transmittals must be accompanied by net revenue test showings. In the future, we expect AT&T will comply fully with applicable price cap procedures.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

The Taber Broadcasting Company of New Mexico
For Construction Permit for a New FM Station on Channel 286C in Maljamar, New Mexico

File No. BPH-850712RO

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 26, 1989; Released: November 7, 1989**

By the Commission:

1. The Commission has before it an application for review filed by Taber Broadcasting Company of New Mexico, ("Taber"), one of two applicants for a new class C FM station to serve Maljamar, New Mexico. Taber seeks Commission review of the Mass Media Bureau's return of its application as inadvertently accepted for tender and filing.

2. Taber's application, filed on July 12, 1985, failed to include page 19 of FCC Form 301, commonly known as the signature page. Consequently, Taber submitted an unsigned application which was also missing the required certification that the public had or would receive local public notice of Taber's proposal in accord with the provisions of 47 C.F.R. §73.3580. Taber's application was therefore returned on August 26, 1986. Arguing that these deficiencies were the result of a ministerial oversight and that the missing information could be discerned from the four corners of the application, Taber sought reconsideration on September 25, 1986. On August 14, 1987, the Bureau denied this request and rejected as untimely an accompanying curative amendment, finding that due to the missing information, Taber's application, as originally filed, violated two aspects of the tenderability criteria set forth in Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19945-19946 (1985), *recon. denied* 50 Fed. Reg. 43157 (1985). Subsequently, on September 21, 1987, Taber filed the instant application for review, in which it requested that the Commission: (i) reinstate its application *nunc pro tunc;* (ii) rescind the construction permit awarded to Woodrow Michael Warren for the facility at Maljamar; (iii) designate its application for hearing; and (iv) accept its amendment curing the noted omissions. An opposition to the application for review was filed on October 6, 1987 by Woodrow Michael Warren and a reply thereto was filed on October 21, 1987 by Taber.

3. The Commission has reviewed the Bureau's action and finds that Taber's application was properly returned as insufficient for tender and filing. In its decision letter, the Bureau thoroughly explained the mechanics and underlying rationale for the "hard look" standard manifest in the new processing procedures and clearly referenced the precedent therefor. Further, the Bureau aptly pointed out that the *Report and Order*, 50 Fed. Reg. at 19945-19946, mandates the return of an application containing such omissions, and duly noted the regulatory basis for its rejection of Taber's untimely amendment. Therefore, we affirm the Bureau's action.

4. Taber has chosen not to rely upon the arguments raised on reconsideration in support of the instant application for review. Instead, Taber proffers entirely new arguments in support of the relief requested herein.[1] However, 47 C.F.R. § 1.115(c) states unequivocally that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Thus, Taber's application for review could be rightfully denied on this basis alone. Nevertheless, because we believe that discussion of the allegations raised therein will accrue to the benefit of future applicants, we will briefly address the arguments before us *de novo*.

5. In chief, Taber readily acknowledges the Commission's right to institute and enforce the "hard look" standard, but now charges that the Bureau's overall application of this standard has been arbitrary, capricious, incapable of withstanding judicial review, and, as applied to it, "hypertechnical." Moreover, Taber declares that the Bureau's decision to return the subject application deprived the company of its right to a hearing pursuant to *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1946) (" *Ashbacker* ") and thus reflects "predjudicial errors of substantive and procedural law." Additionally, four *Hearing Designation Orders* (*HDO's)* are cited which allegedly illustrate the Bureau's disparate treatment of similarly situated applicants: *Warren Price Communicatons, Inc.*, 2 FCC Rcd 4201 (M.M. Bur. 1987) (" *Price* "); *Pyramid Communications, Ltd.*, 2 FCC Rcd 3285 (M.M. Bur. 1987) (" *Pyramid* "); *Rebecca Radio of Marco*, 2 FCC Rcd 4053 (M.M. Bur. 1987) (" *Rebecca Radio* "); and *Key Broadcasting Corporation*, 2 FCC Rcd 3888 (M.M. Bur. 1987) (" *Key* ").

6. Initially we note that Taber has not been deprived of his rights to a hearing pursuant to *Ashbacker*. The Commission can promulgate rules limiting eligibility to apply for a newly allotted channel when such action promotes the public interest, convenience an necessity.[2] "Only by compliance with such procedures may an application enter the ranks of ' *bona fide* applications' protected by *Ashbacker*. " *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1561 (D.C. Cir. 1987). Taber's application never having been accepted for tender had not reached the stage where it is entitled to a hearing under *Ashbacker*.

7. Examination of the above *HDOs*, however, reveals that the facts in each are demonstrably different from those in the instant case. To recount, Taber's application contained two tenderability defects. According to the "hard look" processing procedures, such defects must be remedied before the filing window closes, [3] which in this case was July 12, 1985. Nevertheless, citing the above *HDOs*, Taber requests that we reinstate its application through acceptance of a curative amendment filed September 25, 1986, more than a year after the filing window for Maljamar closed. However, none of the cited *HDOs* involve a decision by the Bureau to grant *nunc pro tunc* reinstatement to an application containing tenderability defects on the basis of an amendment submitted after the filing window closed. For this reason, reliance thereon is fundamentally misplaced and thus unpersuasive.

8. Specifically, at issue in both *Price* and *Pyramid* was the sufficiency of a late-filed, incomplete *amendment*.[4] Unlike Taber's application, the underlying applications were in compliance with our strict tenderability criteria. The tenderability component of the "hard look" standard is intended to detect and eliminate *applications* which at the *initial* stage of processing, contain fundamental errors in key portions therein, in favor of applicants who through compliance with the tenderability standard demonstrate that they are "ready, willing and able" to institute broadcast service. *See Report and Order*, 50 Fed. Reg. at 19940. Subsequent amendments are not required to conform to the tenderability requirements. Nothing in the letter or spirit of the *Report and Order* suggests that its requirements should be so extended. In short, the factual dissimilarities between Taber's application and those in *Price* and *Pyramid* wholly account for the difference in treatment of the matters at issue in these cases.

9. The circumstances presented in *Rebecca Radio* are also markedly different from Taber's situation. As in *Price* and *Pyramid*, an applicant in *Rebecca Radio* had satisfied the Commission's requirements for tenderability. The Bureau then accepted an engineering amendment filed prior to the close of a second 30-day amendment filing period triggered by the reinstatement of another application in the mutually exclusive group, which had previously been found untenderable.[5] The amendment in question had been kept "alive" by a petition for leave to amend which was pending at the time of the second amendment period. Thus, in contrast to Taber's circumstances, *Rebecca Radio* involved a timely filed acceptability amendment to a pending application which had passed tenderability review.

10. *Key* is similarly inapposite. In that case, the Bureau directed Key to file an amendment with the Administrative Law Judge containing certain ownership information missing from Section II, Table I of FCC Form 301. Although Key failed to complete this section, its application still satisfied the Commission's requirements for tenderability. Item 3 of Appendix D to the *Report and Order* addresses the ownership information which must be submitted for purposes of satisfying the tenderability requirements. 50 Fed. Reg. at 19945. Therein, it is made clear that an applicant must respond to questions 6 and 8 of Section II of FCC Form 301. These questions seek to elicit information crucial to the staff's multiple ownership analysis. Information called for in Table I is not an element of tenderability.

11. In conclusion, we find that there has been no arbitrary, capricious or disparate treatment on the part of the Bureau with respect to the instant application. Taber is not similarly situated with any of the applicants in the cases on which it relies. Moreover, it is clear that the Bureau acted in accord with the Commission's regulations in this matter.

12. Accordingly, for the reasons set forth herein, IT IS ORDERED THAT Taber's application for review IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] The arguments initially raised on reconsideration are merely mentioned as part of Taber's narrative of the background of the case.

[2] *See U.* S. v. *Storer,* 351 U.S. 192 (1956).

[3] 47 C.F.R. § 73.3522(a)(6) provides, in pertinent part, that:

> "applications for non-reserved band FM stations . . . may be amended as a matter of right during the appropriate window filing period pursuant to § 73.3564(d). For a period of 30 days following the FCC's issuance of a Public Notice announcing the acceptance of the application for tender, minor amendments may be filed as a matter of right; provided however, that such *amendments may not correct deficiencies in the tender ability of the underlying application"* (emphasis added).

[4] *Pyramid* involved the submission of a late-filed, unsigned amendment (updating partnership interests) which was rejected by the Commission. A subsequently filed, signed version of the same amendment was accepted pursuant to 47 C.F.R. § 1.65. In *Price*, a late-filed, incomplete engineering amendment was also accepted pursuant to § 1.65. However, a completed amendment was required to be filed with the Administrative Law Judge. Consistent with standard practice, no comparative credit was received by either applicant as a result of their respective filings. Again, neither amendment sought to remedy tenderability defects.

[5] Pursuant to the *Memorandum Opinion and Order* (Reconsideration Order) in MM Docket 84-750, 50 Fed. Reg. 43157 (1985), whenever any application within a mutually exclusive group is placed on a public notice of tenderability, all applicants within that mutually exclusive group are afforded an opportunity to file amendments in the 30-day period following release of the public notice.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-420**

In the Matter of

Amendment of Section 73.202(b), RM-6845
Table of Allotments,
FM Broadcast Stations.
(Brockport, New York)

**ERRATUM**

**Released: October 13, 1989**

By the Chief, Allocations Branch:

1. On September 29, 1989, the Commission released the *Notice of Proposed Rule Making*, DA 89-1159, in the above-captioned proceeding. In the *Notice* at paragraph 3, the proposed allotment for Brockport incorrectly specified Class B1 for Channel 288. The proposal is corrected to read:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Brockport, New York | -- | 288A |

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-65**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6188 |
| Table of Allotments, | RM-6342 |
| FM Broadcast Stations. | RM-6343 |
| (East Hemet, Indio, Rancho | RM-6344 |
| California, Sun City, and | |
| Temecula, California)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 12, 1989; Released: November 6, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* (" *Notice* "), 3 FCC Rcd 823 (1988), issued in response to a petition filed on behalf of Claridge Broadcasting Corp. ("Claridge"), licensee of Station KCMJ-FM, Channel 224A, Indio, California. Claridge requested the substitution of Channel 225B for Channel 224A at Indio and modification of its license to specify operation on the higher powered channel. In order to accommodate its proposal, Claridge requested the deletion of Channel 225A at East Hemet, California. Claridge submitted comments supporting its proposal. G. Dale Cowle ("Cowle"), Jones and Associates ("Jones"), and Jim James ("James") filed counterproposals requesting the allotment of Channel 225A to Sun City, California, Rancho California, California, and Temecula, California, respectively. Each of the three counterproposals requires the deletion of Channel 225A at East Hemet and is mutually exclusive with Claridge's proposal and with each counterproposal. Cowle, Jones, and James filed comments supporting their proposals. John Kenkel ("Kenkel") filed untimely comments on behalf of an applicant later identified as Douglas R. Salamanca and Ernie Salgado ("Salamanca and Salgado") opposing the deletion of the East Hemet allotment.[2] Claridge filed comments in reply to Kenkel's untimely comments and in reply to the counterproposals, as well as supplemental comments. [3] Cowle, Salamanca and Salgado, and James filed reply comments. David Larsen filed comments in support of the Temecula counterproposal.

2. The *Notice* proposed the deletion of Channel 225A at East Hemet based on Claridge's argument that East Hemet does not qualify as a community for allotment purposes. Claridge claimed that although East Hemet is a Census Designated Place ("CDP"), no community in the Hemet area is so designated. Claridge argued that East Hemet contains none of the indicia of community status that the Commission commonly associates with such status. Claridge claimed that East Hemet is a neighborhood designation indicating the area's geographical location east of the community of Hemet. Claridge submitted statements from Hemet community leaders and residents attesting to their belief that East Hemet is not a community separate from Hemet. In the *Notice* the Commission specifically requested that parties supporting retention of the East Hemet allotment submit sufficient information to demonstrate that East Hemet has sufficient social, economic or cultural indicia to qualify it as a community for allotment purposes. The *Notice* also requested comments concerning the substitution of Channel 225B for Channel 224A at Indio.

3. Jones supports the deletion of the East Hemet allotment and proposes that Channel 225A be allotted to Rancho California as that community's first local service, and opposes Claridge's mutually exclusive proposal to upgrade the Indio allotment. Jones argues that allotment of a channel constituting Rancho California's first local service is preferable to granting an upgrade at Indio. Jones notes that Rancho California is listed in the *Rand McNally Commercial Atlas and Marketing Guide* as having a 1980 population of 2,500, and claims that the community has experienced substantial growth since 1980. Jones includes a map showing Rancho California and pages from the local telephone directory listing organizations and businesses nominally identified with Rancho California. Jones claims that this information is sufficient to establish the existence of Rancho California as a community for allotment purposes, citing *Beacon Broadcasting*, 2 FCC Rcd 7562 (1987). Finally, Jones states that it will apply for the Rancho California channel if allotted.

4. Cowle proposes the allotment of Channel 225A to Sun City as that community's first local service. Cowle claims that Sun City is a CDP with a 1980 population of 8,460. Cowle claims that municipal services in Sun City include a volunteer fire company, the Sun City Paramedics, and a library, as well as social and civic organizations such as the Sun City Area Chamber of Commerce, Hospice of Sun City, Sun City Apartment Association, Sun City Bike Club, Sun City Billiard Club, and Sun City Crime Watch. Cowle notes that an allotment to Sun City would provide that community with its first local broadcast service and would serve a population of 67,729 in an area of 1,653 square kilometers, whereas adoption of Claridge's proposal would only result in expansion of an existing service. Cowle states that he will apply for Channel 225A if allotted to Sun City.

5. James proposes the allotment of Channel 225A to Temecula as that community's first local service. James notes that Temecula is a CDP and has a population of 1,783, which, James argues, is of sufficient size to warrant local service. James notes that Temecula is included on the map in the *Rand McNally Commercial Atlas and Marketing Guide*. James claims that Temecula has a post office, zip code, volunteer fire department, banks, churches, schools, businesses, and restaurants. He lists forty-one establishments nominally identified with Temecula. James also submits maps designating Temecula and newspaper articles with a Temecula dateline. James notes that he will apply for a Temecula channel if allotted. David Larsen filed reply comments supporting James' proposal and stating that he will file an application for the channel if allotted.

6. Salamanca and Salgado filed two sets of reply comments. They state that they filed an application for the East Hemet allotment. They argue that no commenter has presented sufficient evidence to show that East Hemet is

not a community for allotment purposes and that no commenter has demonstrated a compelling need for deletion of the allotment. Salamanca and Salgado claim that Claridge did not oppose the East Hemet allotment when it was originally made. Furthermore, they argue that Claridge has offered no additional information to show that East Hemet is not a community. Salamanca and Salgado claim that the East Hemet allotment would offer the public interest feature of providing a first local service to the Soboba Indian community. Therefore, Salamanca and Salgado argue, because no commenter has made the case that the initial allotment of Channel 225A to East Hemet was in error, and public interest benefits would result from the implementation of service on the allotment, the attempts to delete the allotment should be denied.

7. In reply comments, Cowle argues that Channel 225A should be allotted to Sun City. Cowle notes that granting any of the counterproposals would result in a first local service, whereas an Indio substitution would provide only an expanded existing service. Cowle claims that Claridge is not operating its Indio station as a full Class A facility, and therefore population gain figures submitted by Claridge in support of its proposal must be closely studied. Cowle also claims that there are at least twelve commercial radio stations in the Indio area. In comparing Sun City to the other counterproposals, Cowle notes that the 1980 Census listed Sun City's population as 8,460, but claims that a 1987 estimate places the total at 14,500. Cowle points to indicia of Sun City's community status, claiming that the town has 15 churches, a library, a weekly newspaper, banks, numerous businesses, and a cable television system. Cowle claims that, although Temecula appears to be a community, Sun City has a population five times greater than that of Temecula. Cowle claims that Rancho California is an unincorporated area not listed by the United States Census, and that Jones has provided few details as to the organizations and businesses in Rancho California. Therefore, Cowle argues, Channel 225A should be allotted to Sun City, as that community is the largest of the three.

8. James submitted reply comments opposing the Sun City proposal. James argues that Cowle has not demonstrated the existence of a distinct and separate population grouping identifiable as Sun City. James claims that the community that Cowle refers to as Sun City is a blend of Quail Valley and Sun City. James claims that Cowle fails to demonstrate that the services bearing the name "Sun City" actually exist within a population grouping identifiable as Sun City.

9. Claridge submitted reply comments stating that Channel 233A is available for use at either Rancho California or Temecula, and that use of the channel would permit the Indio substitution. Claridge also submits a study claiming that the Indio upgrade would provide service to 320,000 people, whereas an allotment to Sun City would provide service to only 66,000. Citing research obtained from the California Department of Commerce, Claridge claims that in 1986, a total of 4,991,800 people traveled to desert resort communities within the proposed service area of the upgraded Indio station, whereas only 1,392,500 people traveled within the proposed service area of the Sun City allotment. Claridge also claims that in 1985, some 231,509 seasonal residents visited communities within the proposed service area of the upgraded Indio station. Finally, Claridge claims that approximately 154,300 people drive through the Indio service area during peak driving hours, whereas only 11,400 people drive through the Sun City service area during peak hours. Therefore, Claridge argues, Channel 225B should be allotted to Indio.

10. After careful consideration of the comments, we find that commenters supporting the retention of the East Hemet allotment have failed to present sufficient evidence to convince us that East Hemet is a community for allotment purposes. Although listing an area as a CDP raises a strong presumption of community status, that presumption is not irrebuttable.[4] Claridge submitted evidence regarding East Hemet sufficient to rebut this presumption. Claridge claimed that no community in the Hemet area is designated as "East Hemet", and showed that the area defined by the East Hemet CDP contains none of the social, economic or cultural components that the Commission generally associates with community status. Furthermore, Claridge submitted statements from area residents and community leaders attesting to their belief that East Hemet is not a community separate from Hemet. On the basis of this evidence, we made a preliminary determination in the *Notice* that Claridge rebutted the presumption that East Hemet is a community. We specifically stated that parties interested in retaining the East Hemet allotment should submit information to demonstrate that East Hemet has social, economic or cultural indicia qualifying it as a community for allotment purposes. No party filed timely comments offering evidence of this type.[5] Because no party presented evidence rebutting Claridge's claims, we find that East Hemet is not a community for allotment purposes. Accordingly, we delete Channel 225A at East Hemet.[6]

11. Deletion of Channel 225A at East Hemet permits the allotment of that channel to Indio, Sun City, Temecula, or Rancho California. Before comparatively considering which of these four places should receive an allotment, we first address "threshhold" issues concerning the community status of Sun City and Rancho California. We find no merit in James' allegation that Sun City, a CDP, is not a community for allotment purposes. Indeed, while James submitted no evidence sufficient to rebut the presumption of community status that designation of a place as a CDP gives rise to, Cowle has shown that there are a number of social and civic organizations located in and identifying with Sun City, as well as a library, volunteer fire company, and paramedic squad. This is sufficient to establish the community status of Sun City, even assuming Sun City was not a CDP. As for the community status of Rancho California, we note that Rancho California appears as a designation in the local telephone directory and a number of businesses are nominally identified with Rancho California. Furthermore, Rancho California is depicted on a map in the *Rand McNally Road Atlas* and is listed in the *Rand McNally Commercial Atlas and Marketing Guide* as having an estimated population of 2500. Accordingly, we find that Sun City, Temecula, and Rancho California constitute communities for allotment purposes.

12. In determining which community merits an allotment, we are guided by the allotment criteria stated in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982), as follows:

(1) First aural service
(2) Second aural service

(3) First local service

(4) Other public interest matters

Co-equal weight is given to priorities (2) and (3).

None of the proposals would result in first or second aural service. Adoption of the Sun City, Temecula, and Rancho California proposals would result in a first local service to each community. The Indio proposal for an enhanced FM service to the areas surrounding Indio falls under the fourth priority. While Claridge submitted information regarding the tourist populations of Indio and Sun City, we do not believe this information is sufficient to overcome our presumption in favor of first local service over an upgrade of an existing service.[7] Of the three remaining communities, Sun City has the greater population. Therefore, we believe that the public interest would best be served by the allotment of Channel 225A to Sun City as that community's first local service.[8]

13. This determination would normally require denial of both the Temecula and Rancho California proposals. However, the Commission's staff conducted an engineering analysis to see if any additional channels are available for allotment to the remaining communities. We found that Channel 233A is available for allotment to either Temecula or Rancho California as a first local service. According to the US Census, Temecula has a population of 1,783, while the estimated population for the unincorporated community of Rancho California is 2500. While a difference in population of approximately 800 necessarily presents a close case, typically the Commission allots a channel to the larger community. In this case, however, we believe the public interest would be better served by the allotment of the channel to Temecula. We note that Temecula supports schools, churches, banks, and assorted businesses. On the other hand, based on the record before us, Rancho California is unincorporated, apparently offers its residents no services, and supports fewer businesses than does Temecula. We also note that since the communities are only one mile apart, both communities would be served by a station in either community. Therefore, although Rancho California appears slightly more populous than Temecula, we believe the more limited extent of the economic, social, cultural, and governmental institutions in Rancho California as compared to Temecula warrants the allotment of a channel to Temecula. Accordingly, Channel 233A is allotted to Temecula as that community's first local service.[9]

14. Because Sun City and Temecula are located within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission obtained concurrence of the Mexican government for the allotments.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204, and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1989** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| East Hemet, California | ---- |
| Sun City, California | 225A |
| Temecula, California | 233A |

16. The period for filing applications for Channel 225A at Sun City, California, will open on **December 22, 1989,** and close on **January 22, 1990.**

17. The period for filing applications for Channel 233A at Temecula, California, will open on **December 22, 1989,** and close on **January 22, 1990.**

18. IT IS FURTHER ORDERED, That the petition for rule making (RM-6188) filed by Claridge Broadcasting Corporation IS DENIED.

19. IT IS FURTHER ORDERED, That the counterproposal filed by Jones and Associates (RM-6342) IS DENIED.

20. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the following:

Ramona Broadcasting Co.
1280 Sequoia Circle
Hemet, California 92343

Douglas R. Salamanca and Ernie Salgado
21100 Highway 79; 164
San Jacinto, California 92383

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Michael Ruger, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] Rancho California, Sun City, and Temecula, California, have been added to the caption in this proceeding.

[2] Kenkel filed a motion to accept his comments, which were filed two days late. Kenkel notes that his earlier motion for an extension of the deadline for filing initial comments was denied in *Order Denying Request for Extension of Time to File Comments* (" *Order* "), DA 88-501 (released April 11, 1988). Kenkel claims that he filed his comments as soon as possible after the release of the *Order*, that consideration of his late-filed comments would not significantly disrupt this proceeding, and that the public interest favors consideration of his comments supporting retention of the allotment.

We deny Kenkel's motion. Commission rule 1.46 states that motions for extension of time must be filed at least seven days before the filing deadline. If a timely motion is denied, comments need not be filed until two business days after the Commission acts on the motion. Kenkel filed his motion five days before the comment filing deadline in this proceeding. When an untimely motion to extend a comment filing date is denied, commenters must submit their comments by the original filing date. Kenkel fails to present sufficient reason as to why we should waive our policy in this instance. Accordingly, we will not consider Kenkel's comments in this proceeding.

[3] Claridge filed a pleading entitled "Motion for Extension of Time [and] Partial Reply Comments". Claridge claimed an extension was necessary in order to submit a signed original engineering report instead of the copy submitted with its comments, and in order to submit additional substantiation of tourist population estimates from a state report that was not ready for release. Fifteen days after the deadline for reply comments had passed, Claridge filed a motion to accept its late-filed supplement. The supplement included the original of Claridge's engineering report and updated tourist population estimates for the Indio and Sun City areas. Salamanca and Salgado filed an opposition to, and Jones and Cowle filed motions to strike, Claridge's supplemental comments.

We deny Claridge's motion for extension of time. Claridge's motion is untimely, as it was filed on the last day of the reply comment period. Claridge made no showing that an emergency situation existed that warranted extension of the reply comment period or consideration of its late-filed supplemental comments. *See* Commission rule 1.46(b). Furthermore, Claridge's motion was filed in conjunction with partial reply comments and not in a separate pleading, as required by Commission rule 1.44. We also deny Claridge's motion to accept late-filed supplemental comments. Commission rule 1.45(c) states that additional pleadings may be filed only if specifically requested or authorized by the Commission. Accordingly, we will not consider Claridge's supplemental comments in this proceeding.

[4] *See Report and Order* (*Searles Valley, California*), 3 FCC Rcd 5221 (1988).

[5] Our determination would remain the same even if we were to consider Kenkel's late-filed comments. Kenkel claimed that thirty-four businesses, a school, a church, and the Lake Hemet Water District were located in East Hemet, and he submitted a map issued by the Hemet Chamber of Commerce designating East Hemet as an area adjacent to the eastern border of Hemet. Kenkel also claimed that the delivery area served by one of Hemet's two zip codes roughly corresponds to the East Hemet area. In reply comments, Claridge submitted an affidavit from the general manager of Station KCMJ-FM claiming that nine of the businesses that Kenkel claims are located in East Hemet either do not exist or are located within the city limits of Hemet. Claridge also argues that both of Hemet's zip codes are considered to be in the delivery area of the city of Hemet. Claridge previously submitted a letter from the president of the Hemet Chamber of Commerce stating that the organization does not consider East Hemet to be a separate community. Claridge and Cowle argue that no party offered affidavits from individuals with actual knowledge of the existence of East Hemet as a community. We note that although some of the businesses listed by Kenkel are apparently located in the East Hemet CDP, Kenkel made no showing that these businesses identified with East Hemet in any manner. Although there is apparently a "Hemet East Motel", none of the businesses or organizations identify themselves with East Hemet by name. Furthermore, the school noted by Kenkel appears to be part of the Hemet school district. In sum, we believe that Kenkel failed to present any evidence showing that area residents perceive East Hemet as a community distinct from Hemet. Kenkel's evidence, if considered, would be insufficient to convince us that our preliminary determination in the *Notice* that East Hemet is not a community for allotment purposes was incorrect.

[6] Applications for Channel 225A at East Hemet submitted by Salamanca and Salgado and Ramona Broadcasting Company are currently on file. Salamanca and Salgado's application was returned, and they filed a petition for reconsideration. Ramona Broadcasting's application was tendered for filing. Ramona Broadcasting did not submit comments in support of the retention of the East Hemet allotment. Deletion of the East Hemet allotment may entitle applicants to a refund of filing fees pursuant to Commission rule 1.1111(a)(4). Applicants seeking a refund should do so by letter directed to the Managing Director. A copy of this *Report and Order* will be mailed to Ramona Broadcasting Company and Salamanca and Salgado.

[7] We note that consideration of Claridge's late-filed supplement would not alter our decision on this point. The supplement included updated tourism figures from the California Department of Commerce stating that in 1987, some 6,210,000 persons visited desert resort communities and 1,719,000 visited communities in the Sun City area. Even if we were to consider these figures, we would continue to maintain that this information is insufficient to overcome our presumption favoring first local service over an upgrade of an existing service.

[8] Reference coordinates for Channel 225A at Sun City are 33-37-29 and 117-12-03, with a site restriction of 9.4 kilometers (5.8 miles) south of the community to prevent short-spacings to Station KWDJ, Channel 224A, Riverside, California, and Station KODJ, Channel 226B, Los Angeles, California.

[9] Reference coordinates for Channel 233A at Temecula are 33-29-36 and 117-08-54.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-29**

In the Matter of

Amendment of Section 73.202(b), RM-6548
Table of Allotments,
FM Broadcast Stations.
(Refugio, Texas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 12, 1989; Released: November 6, 1989**

By the Chief, Allocations Branch:

1. Pursuant to the request of Sound Leasing, Inc. (petitioner), licensee of Station KZTX(FM), Channel 292A, Refugio, Texas, the Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 1627 (1989), proposing to substitute Channel 291C2 for Channel 292A at Refugio. The *Notice* also proposed to modify the license of Station KZTX(FM) to specify operation on the higher class adjacent channel.[1] Petitioner filed supporting comments reaffirming its intention to construct the higher powered facilities. No other comments were received.[2]

2. Based on the information before us, we conclude that the public interest would be served by the substitution of Channel 291C2 for Channel 292A at Refugio, as that community's first wide coverage area FM service. The channel substitution can be made in compliance with the Commission's minimum separation requirements. [3] Since the community is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been obtained for the substitution.

3. As requested, we are modifying the license of Station KZTX(FM) to specify operation on Channel 291C2 in lieu of Channel 292A in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Refugio, Texas | 291C2 |

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Sound Leasing, Inc., for Station KZTX(FM), Channel 292A, Refugio, Texas, IS MODIFIED, to specify operation on Channel 291C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The *Notice* incorrectly identified the proposal as a co-channel upgrade.

[2] John Castle ("Castle"), a potential applicant for vacant Channel 295A at Bloomington, Texas, filed a petition for rule making requesting the reallotment of Channel 291A for Channel 295A at Bloomington. Castle contends that the site restriction imposed on Channel 295A at Bloomington "places the location of a transmitter site in an area of ranches" where he has been unable to obtain leasing rights for constructing a tower. Therefore, Castle represents that Channel 291A will eliminate all siting problems and permit him to utilize the existing site of a cable company. Channel 291A at Bloomington is mutually exclusive with the Refugio proposal. However, Castle filed its petition well after the issuance of this *Notice*, and failed to include a certificate of service indicating he served the petitioner with a copy of his proposal. Therefore, we shall not consider the proposal as it constitutes an *ex parte* presentation. We note that when Channel 295A was initially allotted to Bloomington in MM Docket No. 84-231 (50 FR 3514, January 25, 1985), a 4.1 kilometers (2.5 miles) site restriction was imposed. However, additional engineering analysis reveals that the restriction is no longer necessary. In fact, the channel can be used at the city reference coordinates in compliance with Section 73.207 of the Commission's Rules.

[3] The city reference coordinates are 28-18-18 and 97-16-30.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-34**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6086 |
| Table of Allotments, | RM-6335 |
| FM Broadcast Stations. | |
| (Llano and Kerrville, Texas)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 12, 1989; Released: November 6, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 648 (1988), issued at the request of KLKM Radio[2] (petitioner), permittee of Station KLKM(FM), Channel 285A at Llano, Texas, proposing the substitution of Channel 231C2 for Channel 285A at Llano and the modification of the station's construction permit accordingly. [3] Stiles Communications Corp. ("Stiles"), licensee[4] of Station KRVL(FM), Channel 232A, Kerrville, Texas, filed comments and a counterproposal suggesting the substitution of Channel 232C2 for Channel 232A at Kerrville, and the modification of Station KRVL(FM)'s license to specify operation on the higher class co-channel.[5,6] The proposals are mutually exclusive since they are only separated by 98 kilometers, whereas 130 kilometers is the minimum separation requirement between first adjacent Class C2 channels.

2. In response to the *Notice*, Jack Asbil ("Asbil"), President of the Mason, Texas, Chamber of Commerce and J. D. Spider Johnson ("Johnson"), a member of the Mason, Texas, Chamber of Commerce, filed comments supporting the allotment to Llano. Petitioner filed late comments restating its intention to ( construct the higher powered facilities at Llano.[7] Petitioner also filed reply comments.[8]

## COMMENTS

3. In their comments, Asbil, Johnson and Wilson support the upgrade at Llano and the future use of Channel 285A, once it is vacated from Llano, at Mason, Texas. Asbil, Johnson and Wilson express "an interest in and desire for the allocation of Channel 285A to Mason." Petitioner, in its reply comments, claims that the statements by Asbil, Johnson and Wilson are expressions of interest in the use of Channel 285A at Mason. Williams in its comments asserts that "an interested party could build and construct" an FM station at Goldthwaite, Texas, if Channel 285A is allotted to that community.

4. Petitioner, in its reply comments, contends that expressions of interest in the allotment of Channel 285A at Mason and Goldthwaite have been made by members of the Mason, Texas, Chamber of Commerce and Williams, respectively. Petitioner states that the substitution of Channel 231C2 at Llano would not only provide expanded FM coverage at Llano, but also permit two other Texas communities to receive a first local FM service. The petitioner urges the denial of the Kerrville counterproposal in favor of its non-adjacent upgrade at Llano and the new service at Mason and Goldthwaite.

## DISCUSSION

5. As stated in the *Notice*, the petitioner identified several communities in Texas that could receive Channel 285A once it was removed from Llano.[9] However, we did not specify in the *Notice* an alternative scheme for the allotment of Channel 285A to any other community since neither the petitioner nor any other party had expressed an interest in applying for and constructing a station at these communities.

6. After careful review of the statements of interest by Asbil, Johnson and Wilson, we find that none of these parties states an intention to apply for Channel 285A at either Mason or Goldthwaite, if allotted, or, should they receive authorization, to build a station promptly. Therefore, we do not consider the comments of Asbil, Johnson and Wilson to be *bona fide* expressions of interest in actually constructing an FM station on Channel 285A at Mason, but rather comments in support of a possible first[10] FM allotment at Mason. In addition, we find that Williams has failed to file a valid expression of interest in the allotment at Goldthwaite. Williams only states that "if the assignment is allocated, an interested party could build and construct a FM broadcast station." The statement does not state Williams' intention to do so, however. Furthermore, the comments, as filed, are technically defective as counterproposals because the parties also failed to include engineering data indicating the allotment of Channel 285A could be made to Mason and Goldthwaite in compliance with Section 73.207 of the Commission's Rules. *See Broken Arrow, Oklahoma*, 53 FR 46086, November 16, 1988, and *Springdale, Arkansas; Carthage, Aurora and Willard, Missouri*, 54 FR 3602, January 25, 1989.

7. In view of the aforementioned, we have no valid counterproposals for either Mason or Goldthwaite before us. Therefore, based on the expressions of interest in providing improved FM service at Llano and Kerrville, the Commission on its own motion conducted an engineering analysis to determine the availability of alternative channels to resolve the conflict between those mutually exclusive proposals. We find that Channel 284C2 is available for use at Llano, which permits Channel 232C2 to be considered at Kerrville without the need for comparative consideration. We believe the public interest would best be served by allotting Channel 284C2 to Llano and Channel 232C2 to Kerrville.

8. Accordingly, we find no valid opposition to the allotment of Channel 284C2 to Llano as that community's first wide coverage area FM service. Channel 284C2 can be allotted to Llano in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.3 kilometers (5.8 miles) north of the city.[11] The restriction is required in order to avoid a short spacing to Station KZEP(FM), Channel 283C1 at San

Antonio, Texas. Channel 232C2 can be allotted to Kerrville consistent with the Commission's minimum distance separation requirements with a site restriction of 23.2 kilometers (14.4 miles) northwest of the community.[12] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Stations KLKM(FM) and KRVL(FM) to specify operation on Channel 284C2 and Channel 232C2, respectively.

9. Since the communities are located within 320 kilometers (199 miles) of the U.S.-Mexican border, we have obtained concurrence of the Mexican government for the allotments.

10. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Kerrville, Texas | 221A, 232C2 |
| Llano, Texas | 284C2 |

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Maxagrid Broadcasting Corporation for Station KLKM(FM), Llano, Texas, IS MODIFIED, to specify operation on Channel 284C2 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Griffin Broadcasting Corporation for Station KRVL(FM), Kerrville, Texas, IS MODIFIED, to specify operation on Channel 232C2 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The community of Kerrville, Texas, has been added to the caption.

[2] On June 24, 1988, Maxagrid Broadcasting Corporation was assigned the construction permit for Station KLKM(FM).

[3] Subsequently, Station KLKM(FM) was licensed in accordance with its outstanding construction permit (BPH-871117KB).

[4] Griffin Broadcasting Corporation subsequently became the licensee of Station KRVL(FM).

[5] Public Notice of the counterproposal for Kerrville, Texas, was given on April 15, 1988, Report No. 1724.

[6] Stiles initially filed its request as a separate petition for rule making prior to the initial comment period established in the the *Notice*. The counterproposal reiterated Stiles' interest in the upgrade at Kerrville.

[7] Petitioner's late-filed comments were accompanied by a motion for acceptance. We shall consider the late-filed comments in order to permit the petitioner to restate its interest in the proposal.

[8] David L. Wilson ("Wilson"), a member of the Mason, Texas, Chamber of Commerce filed untimely comments supporting the Llano proposal and the allotment of Channel 285A to Mason, Texas. Mike Williams ("Williams"), Assistant Vice President of the Mills County State Bank in Goldthwaite, Texas, filed untimely comments supporting the allotment of Channel 285A to Goldthwaite, Texas. Stiles filed an emergency Motion for Extension of Time and late reply comments. The petitioner filed late reply comments and a "Motion to File Responsive Comments to Improper Reply Portions of Stiles Reply Comments and the Responsive Comments." We have accepted the the late-filed comments submitted by Wilson and Williams since they were filed before the close of the record herein. However, we decline to grant Stiles' motion for extension of time in accordance with Section 1.46(b), because it did not state an emergency warranting grant of its late-filed extension request. Thus, we shall not consider Stiles' late-filed reply comments nor the petitioner's subsequent filings, in accordance with Sections 1.415(d) and 1.420(d) of the Commission's Rules.

[9] Generally, the reallotment of a channel to another community is possible whenever a channel is removed from one community without benefit of an adjacent channel replacement.

[10] The proposal represents a second local FM service at Mason, since vacant but applied for Channel 250C2 was allotted there effective February 22, 1988. *See Burnet and Mason, Texas*, 53 FR 1630, January 21, 1988.

[11] The restricted site coordinates are 30-50-01 and 98-41-16.

[12] The coordinates are 30-11-55 and 99-18-19. Stiles specified its desire to utilize a site for Channel 232C2 located 26.0 kilometers (16.2 miles) north of Kerrville, at coordinates 30-15-52 and 99-14-20.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-330**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6210 |
| Table of Allotments, | RM-6304 |
| FM Broadcast Stations. | RM-6473 |
| (Gadsden, Holly Pond and Attalla, AL)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 12, 1989; Released: November 6, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4307 (1988), issued in response to two separate petitions for Rule Making. The first, filed on behalf of Ron Hale ("Hale") proposed the allotment of Channel 238A to Gadsden, Alabama (RM-6210), as that community's second local FM service. Hale did not file comments. The second, filed by American Communications and Marketing, Inc. ("ACMI"), requested the allotment of Channel 238A to Holly Pond, Alabama (RM-6304), as that community's first local broadcast service. ACMI filed comments restating its intention to apply for the channel, if allotted. Steven L. Graddick ("Graddick") filed a counterproposal requesting the allotment of Channel 238A to Attalla, Alabama (RM-6473), as that community's first local broadcast service.[2] Graddick filed reply comments.

2. Hale failed to file comments reiterating his intention to apply for Channel 238A to Gadsden, Alabama. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. Therefore, in accordance with Commission policy, no further consideration will be given to the request by Hale. Accordingly, we shall only consider the proposals for allotments to Holly Pond and Attalla. Both proposals seek allotments for first local broadcast service.

3. We believe that both communities are deserving of a first local broadcast service. Therefore, in order to remove the conflict, we have found an alternate channel available for use at Attalla. A staff engineering analysis indicates that Channel 275A can be allotted to Attalla, Alabama, in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. [3] Therefore, Channel 238A can be allotted to Holly Pond, Alabama, in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules[4] with a site restriction 2.6 km (1.6 miles) south to avoid short-spacing to Station WSM-FM, Channel 238C, Nashville, Tennessee.[5]

4. We believe the public interest would be served by allotting Channel 238A to Holly Pond, and Channel 275A to Attalla, since it could provide a first local broadcast service to both communities. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Holly Pond, Alabama | 238A |
| Attalla, Alabama | 275A |

5. The window period for filing application will open on **December 22, 1989** and close on **January 22, 1990.**

6. IT IS FURTHER ORDERED, That the petition for Rule Making filed by Ron Hale (RM-6210) requesting the allotment of Channel 238A to Gadsden, Alabama, IS HEREBY DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The community of Attalla, Alabama, has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on August 22, 1988, Report No. 1745.

[3] Coordinates used for Channel 275A at Attalla, Alabama, are 34-01-06 and 86-05-30.

[4] Coordinates for Channel 238A at Holly Pond, Alabama, are 34-09-03 and 86-36-39.

[5] Reference coordinates at the licensed site of Station WSM-FM are 36-08-27 and 86-51-56.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-21**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6566 |
| Table of Allotments, | RM-6731 |
| FM Broadcast Stations. | |
| (Grove City, Pennsylvania, and Hubbard, Ohio)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 12, 1989; Released: November 6, 1989**

By the Chief, Allocations Branch:

1. At the request of Gary P. Hummel, Robert A. Hogue and Michael Troliano ("petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1443 (1989), proposing the allotment of Channel 270A to Grove City, Pennsylvania, as the community's second local FM service. Petitioners filed supporting comments reiterating their intention to apply for the channel, if allotted. Stephan M. Kramer ("Kramer") filed comments and a counterproposal requesting the allotment of Channel 270A to Hubbard, Ohio, as its first local FM service.[2] The petitioners and Western Pennsylvania Radio, Inc. ("Western"), licensee of Station WRKU-FM, Channel 236B, Grove City, Pennsylvania, filed reply comments. [3]

2. Kramer states that Hubbard (population 9,245 persons) is an incorporated city in Trumbull County, located approximately 10 kilometers northeast of Youngstown, Ohio.[4] Kramer points out that Hubbard has no local radio service while Grove City receives local radio service from commercial FM Station WRKU-FM (formerly WEDA-FM) and noncommercial Station WSAJ-FM. He states that he will apply for the channel, if allotted.

3. Petitioners oppose the allotment of Channel 270A to Hubbard. They state that Grove City, with a population of 8,132 persons, relies heavily on local radio service for community information, local news and emergency services, since Grove City has only a weekly, not daily, local newspaper. Although Station WRKU-FM has been licensed to Grove City since 1962, petitioners submit that since the station recently increased its power and relocated its transmitter closer to Hubbard, the station's programming efforts have been directed more toward Ohio and away from Grove City. They provide letters from various members of the community, such as the Mayor, chief of police, chamber of commerce and others attesting to the belief that Grove City needs a more locally oriented service.

4. Based on the pleadings before us, we believe that both proposals are meritorious. However, our engineering review shows that Channel 270A is the only channel which can be allotted to either community. Therefore, our decision rests on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) First fulltime aural service
(2) Second fulltime aural service
(3) First local service
(4) Other public interest matters
[Co-equal weight given to priorities (2) and (3)]

Neither of the proponents have provided a showing that the allotment of Channel 270A to either Grove City or Hubbard would provide a first or second fulltime service. As for local service, Station WRKU-FM is licensed to Grove City and owes its primary service obligation to that community even though it may not be providing the residents with the same level of local service which they enjoyed prior to 1988 when the station increased its power and relocated its transmitter. *See* 47 CFR Section 73.1120. Therefore, the allotment of Channel 270A to Grove City would provide the community with a second local commercial service. On the other hand, the allotment of Channel 270A to Hubbard would provide the community with its first such service. Therefore, we believe that the public interest would be better served by allotting Channel 270A to Hubbard, Ohio, as the community's first local FM service.

5. Channel 270A can be allotted to Hubbard in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.2 kilometers (5.1 miles) southeast to avoid a short-spacing to Station WVCC, Channel 269A, Linesville, Pennsylvania.[5] Canadian concurrence has been received since Grove City is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Hubbard, Ohio | 270A |

7. The window period for filing applications will open on **December 22, 1989,** and close on **January 22, 1990.**

8. IT IS FURTHER ORDERED, That the petition of Gary P. Hummel, Robert A. Hogue and Michael Troliano to allot Channel 270A to Grove City, Pennsylvania, IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The community of Hubbard, Ohio, has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on April 20, 1989, Report No. 1776.

[3] Western's reply comments consist of a counterproposal requesting the reallocation of Channel 236B from Grove City to Hubbard and the modification of its license for Station WRKU-FM accordingly. Section 1.420(d) of the Commission's Rules and paragraph 3(a) of the Appendix to the *Notice of Proposed Rule Making* state that counterproposals will not be considered if advanced in reply comments. Therefore, we shall not consider Western's reply comments since they constitute an untimely filed counterproposal. *See, Vancouver, Washington, et al.*, 4 FCC Rcd 839 (1989). Accordingly, Kramer's Motion to Strike is granted.

[4] All population figures are taken from the 1980 U.S. Census, unless otherwise indicated.

[5] The coordinates for this allotment are North Latitude 41-06-17 and West Longitude 80-29-58.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-1,**
**Phase II**

In the Matter of

Annual 1988 Access Tariff Filings

## ORDER ON FURTHER RECONSIDERATION

**Adopted: October 13,1989; Released: November 8, 1989**

By the Commission:

1. On December 27, 1988, this Commission released an order resolving most of the issues in this proceeding.[1] On April 27, 1989, we released an order responding to petitions for reconsideration of our *December 27 Order*.[2] The instant Order grants in part a petition for reconsideration of the *April Reconsideration Order* filed by New England Telephone and Telegraph Company (NET) and New York Telephone Company (NYT) (together, NYNEX).[3] The NYNEX petition requests that this Commission: (1) reverse the imposition of an $827,000 refund for NET's special access revenues relating to disallowances of excess deferred taxes; (2) reverse the imposition of a $3 million disallowance of NET's central office equipment (COE) Category 3 costs; and (3) reverse the requirement that NYT refund $16.1 million of special access revenues relating to its inaccurate special access loop forecast.

2. NYNEX argues that this Commission is without statutory authority to impose a refund if a LEC has underearned for the service and period in question. NYNEX Petition at 3. Specifically regarding NET's incorrect amortization of excess deferred income taxes and the resulting $827,000 disallowance, NYNEX argues that NET's category underearning for 1988 should excuse its disallowance obligation.[4] NYNEX states that since NET earned only a 10.61 percent rate of return in the special access category for 1988, some $5.2 million less than it would have earned at the authorized rate of return, this Commission cannot order NET to pay a refund. *Id.* at 8-9.[5]

3. NYNEX argues that the NET interstate COE Category 3 disallowance is based on this Commission's finding that NET used an incorrect interstate COE Category 3 ratio. *Id.* at 4. NYNEX contends that this is a faulty basis on which to order a refund, because the calculations performed by this Commission were based on inaccurate data submissions. *Id.* at 4-5. NYNEX argues that NET's corrected separations data, which this Commission should use, show a different ratio that results in a disallowance of no more than $741,000. *Id.* Furthermore, NYNEX asserts, because NET's 1988 COE Category 3 investment forecast was conservative, the actual 1988 COE Category 3 investment exceeded the forecast by $7 million, so no disallowance is warranted. *Id.* at 5-6.

4. NYNEX states that although this Commission, in our *April Reconsideration Order*, affirmed the NET COE Category 3 disallowance, NET's submission, in its initial petition for reconsideration, corrected the allocator and should have resulted in removal of the disallowance.[6]

5. NYNEX also urges reconsideration of this Commission's determination that NYT must refund $16.1 million of its special access revenues because we found that NYT used incorrect loop counts.[7] NYNEX asserts that, because its 1988 special access rates, as amended in a December 17, 1987, filing, represented a rate decrease, it is immune from any refund obligation.[8] Furthermore, NYNEX contends, NYT's 1988 special access earnings were below the authorized rate of return, resulting in a $21 million shortfall, which also exempts NYT from any refund obligation. *Id.* at 10-11. NYNEX states that NYT's special access customers paid less for service than it cost NYT to provide the service, and that it would be unfair to require NYT to pay a refund under those circumstances. *Id.*

6. Finally, NYNEX responds to our conclusion that "NYT's initial overstatement of its loop count to this Commission was seriously negligent at best and bordered on misrepresentation" by stating that NYT was no more negligent in failing to present revised loop count figures than it was in failing to present revised revenue figures, and that only NYT was injured by this negligence.[9] NYNEX includes attachments showing NET's COE Category 3 investment for 1988, NET's special access rate of return for 1988, and NYT's special access revenues for 1988.

7. The Block Association argues that NYNEX's assertions of underearning in special access for 1988 are unsupported, and that NYNEX is wrong in its contention that this Commission does not have the authority to order a refund. Block Opposition at 1. The Block Association states that this Commission should investigate "the CH syndrome," which the Block Association defines as "the process of deliberately inflating cost or data by a small percentage that will safely pass a superficial audit. The CH syndrome may effectively be used to offset decreases and in cases (*e.g.*, COE Cat. 3) may appear to be a rate reduction when in fact [it] is not." *Id.*

8. Stating that NYNEX "may have applied a 4 percent CH syndrome since divestiture," the Block Association calculates that the 1989 tariff would contain a 24 percent overstatement. *Id.* Finally, the Block Association challenges as insufficient and unsupported NYNEX's attachments purporting to show NET and NYT underearnings for 1988, and urges this Commission to deny the NYNEX petition and to initiate a full investigation. *Id.* at 2.

9. This Commission's rules preclude petitions for further reconsideration that do not relate to modifications of the original order adopted in the initial reconsideration order.[10] The *April Reconsideration Order* did not modify the New England Telephone disallowances or refunds and NYNEX has not demonstrated that any modification that we adopted in the *April Reconsideration Order* is relevant to those disallowances or refunds. NYNEX has presented no new data or arguments that were not considered in prior orders.[11] Accordingly, we dismiss requests to reconsider these New England Telephone disallowances and refunds as repetitious.

10. In order to avoid protracted litigation, the *April Reconsideration Order* did rescind refund requirements relating to rates that represented a decrease from previously effective rates. We did not rescind the New York

Telephone refund requirement based upon NYT's incorrect loop count because we erroneously assumed that the New York Telephone special access rates represented an increase from the previously effective rates. NYNEX has demonstrated in the instant petition for reconsideration that NYT's 1988 special access rates were in fact lower than the previously effective rates. This further reconsideration request is sufficiently related to the modifications in the *April Reconsideration Order* to warrant consideration. We accordingly grant the petition insofar as NYNEX asks us to rescind the requirement that NYT refund $16.1 million in special access revenues to reflect the effect of the erroneous special access loop count that NYT used to develop special access rates.

11. Our decision to rescind this refund obligation does not, of course, affect the underlying disallowance finding. NYNEX has not presented any reason to reconsider that disallowance determination.

12. Accordingly, IT IS ORDERED that the petition for reconsideration of New England Telephone and Telegraph Company and New York Telephone Company IS DISMISSED with regard to New England Telephone Company, and that New England Telephone Company remains obligated with regard to the refund and disallowance ordered in our *December 27 Order* and affirmed in our *April Reconsideration Order*.

13. IT IS FURTHER ORDERED that the petition for reconsideration of New England Telephone and Telegraph Company and New York Telephone Company IS GRANTED, with regard to New York Telephone Company, and that New York Telephone Company is excused from the underlying refund obligation.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order, FCC 88-420, 4 FCC Rcd 4115 (1988) (*December 27 Order*), *appeal pending*, Pacific Bell & Nevada Bell v. Federal Communications Comm'n, No. 89-1194 (D.C. Cir. filed Feb. 23, 1989).

[2] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order on Reconsideration, FCC 89-131, 4 FCC Rcd 3965 (1989) (*April Reconsideration Order*).

[3] An opposition was filed by the 70th Street Block Association (Block Opposition).

[4] NYNEX Petition at 7 (citing *April Reconsideration Order*, 4 FCC Rcd at 3970-71 & Appendix B).

[5] NYNEX also argues that both the *December 27 Order* and the *April Reconsideration Order* provide for the offset of disallowances by revenue shortfalls. *Id.* at 8 (citing *December 27 Order; April Reconsideration Order*, 4 FCC Rcd at 3971, para. 51).

[6] *Id.* at 6-7 (citing *April Reconsideration Order*, 4 FCC Rcd at 3969, para. 34). NYNEX complains that the Order on Reconsideration "provides no explanation for the Commission's failure to consider the corrected data that NET provided in its Petition for Reconsideration and in its 1989 Tariff Review Plan." *Id.* at 7.

[7] *Id.* at 9 (citing *April Reconsideration Order*, 4 FCC Rcd at 3971-72).

[8] *Id.* at 10 (citing Section 204(a) of the Communications Act; *April Reconsideration Order*).

[9] *Id.* at 11-12 n.30. NYNEX states that, although NYT's actual 1988 special access costs were $25.1 million less than the costs it projected in its December 17, 1988, errata filing, its revenues were $46.5 million less. NYNEX also states that NYT had no intent to mislead this Commission or to misrepresent the reasonableness of its special access rates. *Id.*

[10] *See* 47 C.F.R. §§ 1.106(k)(3).

[11] The *April Reconsideration Order* at para. 34 considers NYNEX's arguments regarding NET's COE Category 3 disallowance and its characterization of the adjustment as a comparison of projected and actual data. Paragraphs 50-51 of that Order discuss NET's deferred tax showings and dismiss NET's offset argument. 4 FCC Rcd at 3969, 3970-71.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-497**

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. No. 9 CCSA Stabilized Rate Plan — Transmittal Nos. 1290 and 1543

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 24, 1989; Released: November 8, 1989**

By the Commission:

## I. INTRODUCTION

1. By its *October 12 Order* [1] in this proceeding, the Common Carrier Bureau (Bureau) initiated an investigation of the one-year stabilized rate plan (SRP) proposed by AT&T Communications (AT&T) as a pricing alternative to conventional monthly rates for Common Control Switching Arrangements (CCSA) that it provides to the General Services Administration (GSA). The SRP implemented rates, terms, and conditions originally submitted to GSA by AT&T in response to a request for proposals (RFP).

2. Pacific Bell petitioned to reject or suspend and investigate the proposed revisions. The Bureau denied the request to reject or suspend, but concluded that the revisions warranted investigation. AT&T's revisions proposed under Transmittal 1290 became effective October 13, 1988, subject to investigation. AT&T subsequently modified this tariff in Transmittal 1543, which became effective April 27, 1989. For the reasons set forth below, we terminate this proceeding in light of Transmittal 1543.

## II. BACKGROUND AND PLEADINGS

3. GSA is AT&T's largest customer for CCSA, a generally available service used to provide switching for private line networks. In December 1986, GSA issued an RFP, seeking to replace 15 existing CCSA switches at 14 locations on the Federal Telecommunications System (FTS) network with electronic tandem network (ETN) switching services. These new switches were to provide service as part of the FTS network and, potentially, as part of FTS 2000. At the time of GSA's RFP, the CCSA switching services were provided by AT&T using facilities owned by the local exchange carriers (LECs) and provided to AT&T pursuant to a Shared Network Facilities Arrangement (SNFA). Several LECs responded to the RFP for CCSA locations in their respective territories.

4. After a sequence of procurement proceedings, GSA awarded AT&T contracts to provide CCSA service in 9 of the 14 cities listed in the RFP. Pacific Bell, which had unsuccessfully competed with AT&T for the contracts in two California cities, appealed the GSA decision[2] and separately petitioned this Commission to reject or suspend and investigate the SRP revisions implementing the contract award. Pacific contended, *inter alia*, that AT&T's tariff was an unlawfully discriminatory volume discount, functionally available to a single customer in a few select locations.

5. In the *October 12 Order*, the Bureau denied Pacific's request for suspension, recognizing that the direct costs to the Federal Government of further deferring the SRP proposal would amount to several hundred thousand dollars monthly. As noted above, the tariff became effective, and the Bureau commenced an investigation, deferring designation of issues to a subsequent Order. AT&T subsequently filed Transmittal 1543, which is discussed below.

## III. REVISIONS UNDER TRANSMITTAL 1543

6. The initial SRP proposal was limited to customers ordering a minimum of 13,001 switch ports, and ports qualifying the customer for SRP pricing were limited to several specified locations. The Transmittal 1543 revisions, however, replaced these restrictions with more general provisions. First, the revised SRP is available to customers who place circuit orders of substantially smaller scale, with three progressive levels of rate discount predicated on orders above 1,001, 5,001, and 9,001 switch ports, respectively, and has no cumulative port requirement to qualify for the SRP alternative. Second, the SRP would be immediately available in two additional cities and, more important, would be available in eight other cities when the demand criteria stated in the tariff are satisfied. Finally, the availability of SRP rates at lower switch port concentrations, and free of multiple-location restrictions, removes the bundled aspect of restrictions that characterized the original revisions.

7. AT&T has not altered its financial estimates to reflect demand generated by the new volume steps, because it projects no additional demand at the revised rates. Some reduction in CCSA revenue is anticipated from the extension of the SRP to Newark, New Jersey, and San Diego, California, because current GSA demand at those locations will be repriced at the rates established under Transmittal 1543. AT&T also states that SRP revenues will exceed costs during the representative year even after recognition of changes in the implementation schedule at current SRP locations.

## IV. DISCUSSION AND ORDERING CLAUSE

8. The subsequent AT&T revisions have removed the restrictions that prompted the Bureau's decision to initiate an investigation of the original SRP filing. As revised by Transmittal 1543, AT&T's volume discount for CCSA switching capacity appears to be consistent with the provisions governing the undiscounted CCSA offering. Therefore, this Commission concludes that further investigation of this tariff is not warranted and that this investigation should be terminated.

9. Accordingly, IT IS ORDERED that the investigation instituted by the Common Carrier Bureau in CC Docket No. 88-497 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] AT&T Communications, CCSA Stabilized Rate Plan, CC Docket No. 88-497, 4 FCC Rcd 2626 (1988) (*October 12 Order*).

[2] Pacific's appeal has since been denied. Pacific Bell v. United States, No. 88-1480, Dec. 19, 1988 (C. A. Fed. Cir.).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-528**

In the Matter of

AMERITECH OPERATING COMPANIES
Tariff F.C.C. No. 2

Transmittal Nos. 206 and 239

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 24, 1989; Released: November 8, 1989**

By the Commission:

1. On August 5, 1988, the Ameritech Operating Companies (Ameritech) filed the first of the captioned tariff revisions, Transmittal No. 206, proposing to increase or decrease certain switched access and special access rates charged by Illinois Bell Telephone Company (Illinois Bell). Ameritech characterized the revisions proposed under Transmittal 206 as a necessary response to higher than expected revenue requirements, and indicated that they were prompted by the effect of several separations changes. After reviewing several petitions and a supplemental response by Ameritech to informal inquiries from the Common Carrier Bureau, the Bureau permitted the proposed revisions to become effective in part by the *Suspension Order*.[1] That Order suspended 50 percent of the special access increase and 60 percent of the switched access increase, representing approximations of the extent to which the proposed rate increases were attributable to separations changes. As the data submitted with Transmittal 206 did not enable the Bureau to trace these separations effects, the *Suspension Order* designated separations issues[2] and established a pleading schedule for further investigation of the Ameritech proposals.[3]

2. By Transmittal 239, Ameritech altered the revisions proposed in Transmittal 206 to comport with the requirements of the *Suspension Order*. The Transmittal 239 rates implementing the partial suspension became effective November 3, 1988.[4] On January 18, 1989, Ameritech filed a response in lieu of a direct case, indicating that it would not pursue the outstanding issues specified by the *Suspension Order*, because of the limited time the challenged rates could be effective (assuming Ameritech satisfied this Commission on the designated issues, and the originally proposed increases were reinstated). When the suspension expired April 3, 1989, the rates established under Transmittal 239 were replaced by Ameritech's annual access revisions, altered in some respects in the tariff review process,[5] rather than by the increases originally proposed by Transmittal 206.

3. As Ameritech elected not to submit a direct case that would have allowed the Commission to consider the carrier's practices while its rates were in effect, and the rates based upon the questioned separations practices have since been superseded by Ameritech's 1989 annual access filing, as adjusted, the issues raised by Ameritech's revisions in Transmittal 206, as well as the subsequent revisions in Tr. 239 implementing the *Suspension Order*, are moot.[6]

4. Accordingly, IT IS ORDERED that the investigation of Ameritech Operating Companies Transmittal Nos. 206, 220, 225 and 239 in CC Docket No. 88-528 IS TERMINATED.

5. IT IS FURTHER ORDERED that the petition filed by Ad Hoc Telecommunications Users Committee, seeking to have the rates implemented by Ameritech Transmittal 239 declared unlawful, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] Ameritech Operating Companies, CC Docket No. 88-528, Memorandum Opinion and Order, DA 88-1750, released Nov. 2, 1988 (Com. Car. Bur.) (*Suspension Order*).

[2] The *Suspension Order* required Ameritech to (i) provide a detailed description of the composite allocator computations used to calculate the dial equipment minutes allocator applied to the COE Category 3 revenue requirement, and explain why the composite allocator differed so greatly from original estimates; (ii) explain why the reclassification of C&WF Category 3 message trunks, which increased the proportion treated as interstate, was not offset, at least in part, by a corresponding decrease in the interstate costs in C&WF Category 2; and (iii) explain the steps it took, if any, to develop circuit equipment separations factors projected for 1988 from 1986 study data, to determine that those cost projections are reasonably consistent with demand projections.

[3] *Id.* at para. 39.

[4] On November 16, 1988, the Ad Hoc Telecommunications Users Committee petitioned the Commission to declare the rates implemented under Transmittal 239 unlawful. Ameritech filed its opposition November 30, 1988, and Ad Hoc its reply December 9, 1988. Ad Hoc's petition misconceives the *Suspension Order*. Because Ad Hoc views the partial suspension as directed to the carrier's anticipated overall revenue increase, rather than to the portion of the increase attributed to the questioned separations changes, it applies an improper standard to the revisions made by Transmittal 239, and incorrectly deduces that the revisions contradict the *Suspension Order*.

[5] In *Annual 1989 Access Tariff Filings*, Memorandum Opinion and Order, DA 89-337, released Mar. 22, 1989, (Com. Car. Bur.) the Chief, Common Carrier Bureau disallowed that portion of Ameritech's proposed revenue requirement that did not reflect the use of the composite allocator (used to apportion local switching equipment between the jurisdictions) first specified in the 1988 annual access filing. *Id.* at paras. 369-373. That Order noted that since the 1988 annual filing Ameritech had significantly varied the composite allocator on successive occasions, starting with the Transmittal 206 filing, and "so far without satisfactory explanation." *Id.* at para. 371. The effect of the disallowance was to reduce the revenue requirement for local switching by $4.0 million.

[6] It appears from earnings reports for the final quarter of calendar 1988 that the questioned rates did not enable Illinois Bell to meet, much less exceed, its authorized level of return. While earnings reports for the first quarter of calendar 1989 are not yet available, it appears highly improbable that the questioned rates will result in excessive earnings for the brief period of their effectiveness. Our decision to terminate this investigation does not, of course, foreclose complaints under Section 208 of the Communications Act, 47 U.S.C. § 208, relating to these rates.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 87-255**

In the Matter of

BELL ATLANTIC TELEPHONE COMPANIES Tariff F.C.C. No. 1 — Transmittal No. 172

## MEMORANDUM OPINION AND ORDER

**Adopted: October 24, 1989; Released: November 8, 1989**

By the Commission:

### I. BACKGROUND

1. In April 1987, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 172. By this filing, Bell Atlantic proposed a single rate for the recovery of costs associated with providing the operator services of line status verification (LSV) and call interruption (CI) to interexchange carriers (IC) on behalf of the ICs' customers.[1] MCI Telecommunications Corporation (MCI) filed a petition to reject, or in the alternative, to suspend and investigate the proposed rate.[2]

2. Bell Atlantic's rate for LSV and CI was subsequently designated for investigation but was allowed to become effective subject to the investigation.[3] The Common Carrier Bureau reasoned that suspension was unnecessary because the revenue at issue was minimal and the proffered services were in the public interest.[4] The *Designation Order* identified five issues for investigation.[5] Bell Atlantic filed its direct case in response to the Bureau's *Designation Order* and MCI filed comments stating that the tariff was unlawful and should be rejected.[6] In July 1988, the Bureau released an Order which concluded that most of the explanations provided by Bell Atlantic were satisfactory and that investigation of four of the five issues was therefore complete.[7]

3. The fifth issue is still before this Commission. In the *Designation Order*, the Bureau ordered Bell Atlantic to provide data that segregated the direct and indirect costs of LSV and CI.[8] Bell Atlantic was also ordered to provide a description of its allocation method that adequately demonstrates that LSV and CI costs are regulated interstate costs and that none of these costs was reflected in charges for other access elements.[9] In its *July 1988 Order*, the Bureau concluded that Bell Atlantic had not satisfactorily addressed these concerns.[10]

4. Consequently, the *July 1988 Order* required Bell Atlantic to recast its 1988 base case by August 26, 1988.[11] Upon review of these data, the Bureau concluded that the data failed to indicate whether the expenses for LSV and CI were properly allocated, and therefore issued a second request for data on April 17, 1989.[12] The Bureau Letter instructed Bell Atlantic to recast its 1988 Tariff Review Plan Charts COS-1(P)32 and COS-2(P)32.[13] Chart COS-1 was to be modified by disaggregating the "Other Interstate, Column H" into one column called "LSV/CI" and another column labeled as "All Other Interstate."[14] Bell Atlantic complied with this request.[15]

### II. DISCUSSION

5. The final issue currently before us in this investigation is whether the investments and expenses associated with LSV and CI have been correctly assigned, as demonstrated by Bell Atlantic's data describing the direct and indirect costs associated with this service. This Commission has reviewed the data submitted by Bell Atlantic with respect to this issue. We have concluded that Bell Atlantic's charts adequately demonstrate that the direct and indirect investments and expenses associated with the provision of LSV and CI are reasonably allocated to those rates and are not misallocated to other services or categories.

6. Our particular concern was the proper allocation of indirect, overhead costs. The allocation of approximately $25,000 of corporate operations expense to the LSV and CI element within the Other Interstate Cost Category, as displayed in the recast Chart COS-1(P)32, demonstrates that overhead costs have been assigned to the LSV and CI element. We thus conclude that Bell Atlantic has properly calculated the investments and expenses associated with the LSV/CI services and that rate adjustments are not required. Therefore, we terminate our CC Docket No. 87-255 investigation.

### III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that the investigation of Bell Atlantic Telephone Companies, Tarifff F.C.C. No. 1, Transmittal No. 172, CC Docket No. 87-255, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

### FOOTNOTES

[1] Bell Atlantic Tariff F.C.C. No. 1, Tr. No. 172, filed Apr. 15, 1987.

[2] MCI Petition To Reject, or in the Alternative, To Suspend and Investigate, filed Apr. 30, 1987 (MCI Petition).

[3] Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Tr. No. 172, CC Docket No. 87-255, Order Designating Issues for Investigation, 2 FCC Rcd 4245 (Com.Car.Bur. 1987) (*Designation Order*).

[4] *Id.* at 4247.

[5] *Id.*

[6] Bell Atlantic Direct Case, filed Aug. 14, 1987; Comments of MCI Telecommunications Corporation, filed Sept. 14, 1987 (MCI Comments).

[7] Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Tr. No. 172, CC Docket No. 87-255, Memorandum Opinion and Order, 3 FCC Rcd 4456 (Com.Car.Bur. 1988) (*July 1988 Order*).

[8] *Designation Order*, 2 FCC Rcd at 4247.

[9] *Id.*

[10] *July 1988 Order*, 3 FCC Rcd at 4459.

[11] *Id.* MCI did not file a response to the Bell Atlantic report.

[12] Letter from Chief, Tariff Division, Common Carrier Bureau, to P. Hanley, Vice President, Bell Atlantic, Apr. 17, 1989 (Bureau Letter).

[13] *Id.* at 1.

[14] *Id.*

[15] *See* Letter from J.M. Lee, Attorney, Bell Atlantic, to Secretary, FCC, May 3, 1989.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 87-579**
**Phase II**

In the Matter of

Access Billing Requirements for Joint Service Provision

Applications for Review

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 29, 1989; Released: November 8, 1989**

By the Commission:

## I. INTRODUCTION

1. On October 4, 1988, the Common Carrier Bureau (the Bureau) released an Order in the above proceeding.[1] Whenever more than one local exchange carrier (LEC) participates in providing access service to access customers but the participating LECs do not have a single source of bills for such service, that Order requires those LECs to justify their failure to establish a single source for their bills. On November 3, 1988, the National Telephone Cooperative Association (NTCA) and the Texas Statewide Telephone Cooperative, Inc. (TSTCI) filed separate applications for review of that Order. No oppositions were filed.

2. We have considered these two applications in light of our previous Orders and the proceedings leading to the Bureau's *October 1988 Order*. For the reasons discussed below, we deny these applications.

## II. BACKGROUND

3. On various occasions since 1983, this Commission and the Bureau have considered the billing questions which arise when two or more LECs provide customers with access service. In 1984, we rejected single company billing and required that LECs use meet point billing in such cases because meet point billing results in the customer being charged under the tariffs of each LEC that contributed to the access service.[2] However, we delayed implementation of this requirement until January 1, 1988. As of that date, we required LECs to use meet point billing for all access services except Feature Groups A and B and special access. [3]

4. While use of either a single bill or multiple bills results in the access customer being charged under the tariffs of each LEC that provides a portion of the service, multiple bills do not enable an access customer to receive from one source a single bill or series of bills for all charges. Accordingly, our *July 1987 Order* declared that the single bill option (SBO), in one of three specified forms, was preferable to multiple bills because the former enhances billing accuracy and customer verification of access bills.[4] We stated, however, that we would continue to allow LECs to use multiple bills in certain limited circumstances.[5] In December 1987, the Bureau established the "substantial justification" requirement and announced its intent to examine more closely the extent to which LECs must justify their use of multiple bills.[6] The Bureau initiated a formal investigation in June 1988 which led to the *October 1988 Order*.[7]

5. The *October 1988 Order* directed those LECs who had not implemented SBO and had not yet justified their use of multiple bills to justify their use of multiple bills in a filing on or before December 1, 1988.[8] The Bureau also described three circumstances that must be present in order to justify multiple bills.[9] The Bureau stated that the failure of a LEC either to obtain a waiver or adequately to demonstrate these circumstances might lead to rejection of tariffs using multiple bills. In response to a NECA petition for such a waiver, the Bureau released an Order on December 28, 1988, which waived the requirements of the *October 1988 Order* for some smaller LECs and postponed its requirements for certain others.[10] In response to other petitions, the Bureau has clarified and in some cases waived the requirements of the *October 1988 Order*.[11]

## III. APPLICATIONS FOR REVIEW

6. In their separate applications for review, NTCA and TSTCI both contend that the Bureau's *October 1988 Order* is not consistent with this Commission's policy, particularly as that policy is reflected in our *July 1987 Order*. Specifically, applicants note the portions of that Order which provide that multiple bills should be retained for use if the participating LECs cannot agree on an SBO and that multiple bills should be retained to avoid coercing any LEC into an arrangement that is unsatisfactory to the LEC. They also cite language in that Order acknowledging the importance of flexibility for smaller LECs and LECs that have already implemented meet point billing. NTCA claims that the Bureau's "substantial justification" requirement is so strict as to be tantamount to prohibiting LECs from using billing options other than SBO and that, as a result, smaller LECs are deprived of flexibility in choosing among the available billing options.[12] Also, according to TSTCI, a LEC may not be able to demonstrate one or more of the specified characteristics but may desire to use multiple bills. That LEC, in the view of TSTCI, would be coerced into an unsatisfactory billing option contrary to the language of our *July 1987 Order*.[13]

7. NTCA and TSTCI also contend that the Bureau did not establish an adequate record or other rational basis for the imposition of either the general "substantial justification" requirement or the specific characteristics described in the Bureau's *October 1988 Order* to meet that requirement. They claim the Bureau's recognition of these particular characteristics as essential to any "substantial justification" is contrary to our policy for the same reasons that the justification requirement itself is contrary to such policy. In addition, NTCA submits that the record in this proceeding lacks an examination of the public policy implications of burdening smaller LECs with the "substantial justification" requirement and that the Bureau has not satisfactorily explained the need for strict justification when it has in fact allowed LECs in substantial portions of the Nation to use multiple bills.[14]

8. NTCA also claims that in two cases LECs seeking to utilize multiple bills should automatically be deemed to meet all or some of the requirements for "substantial justification." If two LECs are jointly providing a particular access service and the first LEC obtains authorization to use multiple bills for that service, NTCA argues that the second LEC should not have to justify multiple bills. In the second case, a LEC desires to use multiple bills but has deferred implementation of that option pending release of the Bureau's *October 1988 Order* or other guidance from this Commission. NTCA appears to argue that such a LEC should be treated in the same manner as a second LEC that implemented multiple bills before the development of the single bill options where such treatment enables the first LEC to satisfy the first of the three "substantial justification" requirements set out in the *October 1988 Order*.[15]

9. Finally, NTCA complains that the *October 1988 Order* did not address all of the objections that NTCA raised in its earlier comments.[16]

## IV. DISCUSSION

10. Contrary to the assertions of the applicants, we believe the Bureau's *October 1988 Order* is consistent with our established policy. Our *July 1987 Order* clearly states our strong preference for the SBO. We stated in the *July 1987 Order* that the SBO is preferable for meet point billing because it enhances billing accuracy and customer convenience. While we allowed retention of multiple bills in certain limited cases, we stressed that multiple bills should be used only as a last resort because of the problems they present for customers. We further declared that if any LEC employed multiple bills in an access tariff, it must explain in that tariff why the SBO is not feasible.[17] While the Bureau's *October 1988 Order* reflects a preference for single bills, the Bureau did not follow the suggestion of some commenters and mandate the SBO for all LECs. Rather, recognizing the concerns expressed by NTCA, TSTCI, and others, the Bureau directed that, while multiple bills would remain available, those LECs seeking to use multiple bills would need to justify such use. Most LECs responded to the *October 1988 Order* by implementing the SBO, obtaining a waiver, or otherwise adequately justifying their use of multiple bills.

11. However, we note that the Bureau's *October 1988 Order* does constrain each LEC's selection of a billing option for meet point billing. As a practical matter, each LEC is required to consider carefully the three alternative forms of the SBO and, if all are rejected, to articulate the reasons for their rejection. If a LEC refuses to implement one of the SBO alternatives in its access tariff and fails either to qualify for a waiver or otherwise to justify adequately use of multiple bills, then the Bureau may reject that tariff for failure to comply with a Commission or Bureau Order. Accordingly, the LECs are not entirely free to choose between the SBO and multiple bills.

12. On the basis of the proceedings leading to our *July 1987 Order* and to the Bureau's *October 1988 Order*, we conclude that the "substantial justification" requirement as well as the Bureau's insistence that LECs demonstrate certain criteria to meet that requirement are consistent with our *July 1987 Order*. That order clearly states our preference for the SBO for meet point billing. Thus, our *July 1987 Order* formed the basis for the "substantial justification" requirement in the Bureau's subsequent Orders.

13. Similarly, each of the three circumstances described in the Bureau's *October 1988 Order* has its source in our *July 1987 Order* and in the proceedings leading to that Order and to the Bureau's Orders in December 1987 and June 1988.[18] Accordingly, both our policy and the record in these proceedings are more than adequate to support the establishment by the Bureau of the "substantial justification" requirement and the use by the Bureau of the three specified criteria to determine whether that requirement has been met. We are also satisfied that the Bureau has given adequate consideration to the needs of smaller carriers.

14. We do not believe that LECs in either of the two cases described by NTCA should automatically be deemed to meet all or any of the "substantial justification" requirements of the Bureau's Orders. While the situations described in each of those cases may, in a particular instance, enable a LEC substantially to justify its use of multiple bills, we are not prepared to declare that such circumstances will, in every case, wholly or partially justify multiple bills. We believe it is preferable to decide on a case-by-case basis in the context of either a tariff filing or a petition for waiver or other relief. Such a procedure will limit exceptions to the maximum extent possible and thereby accelerate conversion to the SBO.

15. Finally, we believe that the Bureau adequately considered the NCTA comments prior to adoption of the *October 1988 Order*. That Order summarizes the substance of those comments and responds by stating that our Orders indicate that certain demonstrations must be made before a LEC may use multiple bills. Also, we note that while NTCA listed six additional issues for rule making, NTCA also conditioned exploration of those issues on adoption by the Bureau of a mandatory SBO system for all LECs.[19] As the Bureau rejected mandatory imposition of the SBO, further consideration of those issues was not necessary.

## V. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED that the applications for review filed by the National Telephone Cooperative Association and the Texas Statewide Telephone Cooperative, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Phase II, DA 88-1544, released Oct. 4, 1988 (Com.Car.Bur.) (*October 1988 Order*).

[2] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC 2d 1082, 1176-77 (1984). Under a single company billing system, interexchange carriers (ICs) and other customers

order access service from a single LEC which accepts the order, determines the charges under its own tariff for all services, arranges the service, bills the customer, and then, if a revenue sharing agreement exists, settles with the other LEC or LECs involved. Meet point billing requires all LECs involved to divide ordering, service arrangement, and billing activities on a proportional basis so that each LEC charges under its own tariff for its respective portion of the service provided.

[3] *See* Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, Memorandum Opinion and Order, 2 FCC Rcd 4518 (1987), Erratum, CC Docket No. 86-104, 2 FCC Rcd 4731 (1987) (together, *July 1987 Order*). *See also* Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 87-579, Memorandum Opinion and Order, 3 FCC Rcd 13 (Com.Car.Bur. 1987)(*December 1987 Order*).

[4] The three forms of SBO are as follows: single bill/multiple tariff, single bill/pass-through tariff, and single bill/single tariff. For a detailed description of these forms, *see July 1987 Order*, 2 FCC Rcd at 4519.

[5] *See id.* at 4521.

[6] *See December 1987 Order*, 3 FCC Rcd at 17-18.

[7] Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Order Designating Issues for Investigation, 3 FCC Rcd 3568 (Com.Car.Bur. 1988) (*June 1988 Order*).

[8] *October 1988 Order* at paras. 93-95.

[9] The *October 1988 Order* states that LECs may justify multiple bills if the LEC: (1) either implemented meet point billing at a time before the development of SBOs, or is so small that conversion would be impracticable; (2) makes a persuasive showing of the difficulties (financial, technological, and administrative) of conversion; and (3) offers adequate assurance that it has incorporated and strictly follows the Multiple Exchange Carrier Access Billing (MECAB) guidelines for bill verification. The *October 1988 Order* states that LECs must demonstrate all three of these criteria to utilize multiple bills. *See id.* at para. 73. Where LECs employ multiple bills for meet point billing, the MECAB guidelines specify a series of common data elements for those bills which are essential for the later verification and audit of such bills. In its *July 1987 Order*, the Commission accepted a report of the Ordering and Billing Forum (OBF) of the Exchange Carriers Standards Association, Inc., which, *inter alia*, recommended that all LECs using multiple bills follow the MECAB guidelines. In its *December 1987 Order*, the Bureau directed that such LECs incorporate these guidelines into their access tariffs. Finally, in its *October 1988 Order*, the Bureau not only ordered such LECs to comply with these guidelines but also ordered them to attach billing samples to their tariffs to demonstrate such compliance.

[10] Access Billing Requirements for Joint Service Provision, National Exchange Carrier Association, Petition for Waiver, CC Docket No. 87-579, Phase II, Memorandum Opinion and Order, 4 FCC Rcd 536 (Com. Car.Bur. 1988).

[11] *See, e.g.*, Waiver of Access Billing Requirements and Investigation of Permanent Modifications, Rochester Telephone Corporation, Petition for Waiver, CC Docket No. 86-104, Memorandum Opinion and Order, 4 FCC Rcd 1788 (Com.Car.Bur. 1989); Access Billing Requirements for Joint Service Provision, Access Tariff Revisions To Implement Meet Point Billing, CC Docket No. 87-579, Phase II, Memorandum Opinion and Order, 4 FCC Rcd 2163 (Com.Car.Bur. 1989); Access Billing Requirements for Joint Service Provision, Ameritech Operating Companies, CC Docket No. 87-579, Phase II, Order, 4 FCC Rcd 2162 (Com.Car.Bur. 1989).

[12] NTCA Application at 3.

[13] TSTCI Application at 9.

[14] NTCA Application at 5-6.

[15] *Id.* at 5.

[16] *Id.* at 6-7.

[17] *See July 1987* Order, 2 FCC Rcd at 4521; notes 4-5, supra, and the accompanying text.

[18] See note 9, supra, for a list of these circumstances. One source of the first of these lies in part in para. 22 of our July 1987 Order, which noted the importance of flexibility for small LECs and LECs that have already implemented some form of meet point billing. Comments filed by NTCA, TSTCI, and others formed the basis for such findings. See also Section V of that Order. The second circumstance traces its origin in part to para. 23 of our July 1987 *Order* which provides that LECs employing multiple bills must explain in their tariffs why SBO is not feasible for them. Finally, the third relates to the many comments from ICs who complained about the difficulty of verifying LEC access bills, and to the recommendations of the OBF with regard to reliance on the MECAB guidelines.

[19] See NTCA Comments, filed June 27, 1988, at 11-12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-479**

In the Matter of

Amendment of Section 73.202(b), RM-7030
Table of Allotments,
FM Broadcast Stations.
(Newberry, Michigan)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 11, 1989; Released: November 7, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Leon B. Van Dam (petitioner), requesting the substitution of FM Channel 250C1 for Channel 250C2 at Newberry, Michigan. Petitioner also requests modification of his construction permit (BPH-880613MG) for Channel 250C2, to specify Channel 250C1.

2. We believe petitioner's proposal warrants consideration. Channel 250C1 can be allotted to Newberry, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] Since Newberry is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government will be required for this allotment. We shall also propose to modify the construction permit of Leon B. Van Dam to specify operation on Channel 250C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to enable Station WUPQ an opportunity to expand its coverage for the Newberry, Michigan area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Newberry, Michigan | 229C2, 250C2 | 229C2, 250C1 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 29, 1989,** and reply comments on or before **January 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leon B. Van Dam
P.O. Box 152
Newberry, Michigan 49868

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for Channel 250C1 are 46-18-53 and 85-33-45.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-480**

In the Matter of

Amendment of Section 73.202(b), RM-6500
Table of Allotments,
FM Broadcast Stations.
(Sullivan and Newton, Illinois)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 16, 1989; Released: November 7, 1989**

By the Chief, Allocations Branch:

1. The Commission herein considers a petition for rule making filed by Superior Broadcasting, Inc., (petitioner), licensee of WSAK(FM), Channel 292A, Sullivan, Illinois, proposing to substitute Channel 294B1 for Channel 292A and to modify its Class A license to specify the new channel. In order to accomplish the upgrade, petitioner has requested that Channel 255A or 278A be substituted for Channel 295A at Newton, Illinois. Channel 295A was allotted to Newton in MM Docket 84-231 and made available for applications in Window No. 77, which opened June 17, 1988, and closed July 28, 1988, and for which two applications are now pending.[1] In addition, WSAK requests that we impose a site restriction on an application for modification of the permit for Channel 293B, WRTB(FM), Washington, Indiana.[2]

2. A staff engineering analysis reveals that Channel 294B1 can be allotted to Sullivan, Illinois, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[3] The proposed substitution of Channel 278A for Channel 295A at Newton can be accomplished in compliance with the minimum distance separation requirements of the Commission's Rules at both applicant's specified sites.[4]

3. In accordance with Commission policy, we shall propose to substitute Channel 294B1 for Channel 292A at Sullivan, Illinois, and modify the licensee for Station WSAK(FM) to specify operation on higher class channel. We shall also propose the substitution of Channel 278A for Channel 295A at Newton, Illinois. Pursuant to Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest for Channel 294B1. The applicants for Channel 295A at Newton will be permitted to amend their applications to specify Channel 278A, if allotted, and retain cut-off protection, since no upgrade in the class of channel is proposed.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below:

| City | Channel No. Present | Proposed |
|---|---|---|
| Newton, Illinois | 295A | 278A |
| Sullivan, Illinois | 292A | 294B1 |

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this Notice by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 295A at Newton, Illinois, as follows:

S. Kent Lankford
Route 3, Box 409
Lawrenceville, IL 62439

Jasper Broadcasting
Company
P.O. Box 151
Newton, IL 62448

Green Construction of Indiana,
Inc.
3 E. Vantrees
Washington, IN 47501
(Licensee of WRTB(FM))

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 29, 1989,** and reply comments on or before **January 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Aaron Shainis
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 700
Washington, D. C. 20036
(Counsel for Superior Broadcasting, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall

be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Applications on file for Channel 295A at Newton, Illinois, are by S. Kent Lankford (880727MI) and Jasper Broadcasting Company (880728MP).

[2] The application for modification of WRTB(FM), Washington, Indiana, licensed to Green Construction (BPH-870227OD) was dismissed by the Commission by letter of December 14, 1988. Green Construction filed a petition for reconsideration of that action on January 13, 1989.

[3] The coordinates for Channel 294B1 at Sullivan are 39-37-49 and 88-30-28.

[4] The coordinates in the application filed by S. Kent Lankford (880727MI) are 38-59-22 and 88-10-57 and the coordinates specified in the application filed by Jasper Broadcasting Company (880728MP) are 39-00-05 and 88-11-25.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-481**

In the Matter of

Amendment of Section 73.202(b), RM-6918
Table of Allotments,
FM Broadcast Stations.
(Morehead City, North Carolina)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 11, 1989; Released: November 7, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Curtis Radio Group, Inc. (petitioner) requesting the substitution of Channel 242C1 for Channel 242C2 at Morehead City, North Carolina, and the modification of its license for Station WRHT(FM) accordingly. Petitioner states that it will apply for the channel, if allotted. Channel 242C1 can be allotted to Morehead City in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 242C1 for Channel 242C2 at Morehead City, North Carolina, since it could enable Station WRHT(FM) to expand its coverage area. As requested, we are also proposing to modify petitioner's license for Station WRHT(FM) to specify operation on Channel 242C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Morehead City or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Morehead City, North Carolina | 242C2 | 242C1 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 29, 1989,** and reply comments on or before **January 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Tharrington, Smith & Hargrove
P.O. Box 1151
209 Fayetteville Street Mall
Raleigh, North Carolina 27602
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 34-43-18 and West Longitude 76-42-54.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-482**

In the Matter of

Amendment of Section 73.202(b), RM-6920
Table of Allotments,
FM Broadcast Stations.
(Newport, Oregon)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 11, 1989; Released: November 7, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jonathan Seagull Broadcasting Company (petitioner) requesting the allotment of Channel 224C3 to Newport, Oregon, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 224C3 can be allotted to Newport in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 224C3 to Newport, Oregon, since an interest has been expressed in providing the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Newport, Oregon | 274C1 | 224C3, 274C1 |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 29, 1989,** and reply comments on or before **January 16, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Hayes, Jr., Esq.
1359 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 44-38-30 and West Longitude 124-03-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-14**

In the Matter of

Amendment of Section 73.202(b), RM-6524
Table of Allotments,
FM Broadcast Stations.
(Hot Springs and Pine Ridge,
South Dakota)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 11, 1989; Released: November 7, 1989**

By the Chief, Allocations Branch:

1. At the request of Tracy and Valerie Bastian ("petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1596 (1989), proposing the substitution of Channel 244C1 for Channel 244A at Hot Springs, South Dakota, the modification of their license for Station KZMX(FM) to specify the higher powered channel, and the substitution of Channel 228A for unoccupied and unapplied for Channel 243A at Pine Ridge, South Dakota. The petitioners filed supporting comments in which they restate their intention to apply for Channel 244C1, if allotted to Hot Springs. No other comments were received.

2. We believe the public interest would be served by making the channel substitutions requested since they could enable Station KZMX(FM) to expand its coverage area. Channel 244C1 can be allotted to Hot Springs in compliance with the Commission's minimum distance separation requirements and can be used at Station KZMX(FM)'s present transmitter site. Channel 228A can be allotted to Pine Ridge in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As proposed, we will also modify petitioner's license for Station KZMX(FM) to specify operation on Channel 244C1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 22, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Hot Springs, South Dakota | 244C1 |
| Pine Ridge, South Dakota | 228A |

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Tracy and Valerie Bastian for Station KZMX(FM), Hot Springs, South Dakota, IS MODIFIED to specify operation on Channel 244C1, in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] The coordinates for Channel 244C1 at Hot Springs are North Latitude 43-26-34 and West Longitude 103-27-27. The coordinates for Channel 228A at Pine Ridge are North Latitude 43-01-06 and West Longitude 102-33-24.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-51**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6076 |
| Table of Allotments, | RM-6265 |
| FM Broadcast Stations. | |
| (Evans, Martinez and Warrenton Georgia) | |

**SECOND REPORT AND ORDER**
**AND**
**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 11, 1989; Released: November 7, 1989**

By the Chief, Allocations Branch:

1. At the request of Columbia County Broadcasters ("Columbia"), the Commission has before it the *Further Notice of Proposed Rule Making and Memorandum Opinion and Order* ("*Further Notice*"), 3 FCC Rcd 7312 (1989), proposing the substitution of Channel 299C2 for Channel 232A at Martinez, Georgia, and the modification of its license for Station WMTZ to specify the higher powered non-adjacent channel. Columbia, Finlaplander Broadcasting ("Finlaplander"), Lyn H. Shecut and John F. McDevitt d/b/a Reactive Radio Broadcasting Partnership ("Reactive Radio"), Evans Broadcasters ("Evans") and Bible Broadcasting Network, Inc. ("Bible") filed comments. Reactive Radio filed reply comments.[1] In addition, Evans filed a petition for reconsideration of that portion of the *Further Notice* which found that Evans was not a community for allotment purposes. No comments in response to the petition for reconsideration were received.

2. As stated in the *Further Notice*, the modification of Columbia's license to specify Channel 299C2 would constitute a non-adjacent channel upgrade and therefore an opportunity was provided for other interested parties to express an interest in use of the channel. In response, Finlaplander, Reactive Radio, Evans and Bible each stated their intention to apply for the channel, if allotted to Martinez. Columbia, in its supplementary comments, requests that Channel 230C3 be substituted for Channel 232A at Martinez, and that its license for Station WMTZ be modified accordingly.

3. Evans, in its petition for reconsideration, states that the Commission erred in not finding that Evans is a community for allotment purposes. In support, it states that Evans is located within the Evans Division of Columbia County and is part of the Augusta metropolitan area. It states that the Rand McNally Road Map for Georgia identifies Evans as a distinct community with an estimated population of 800, based on the 1980 U.S. Census. Evans also furnishes information showing that the Southern Bell Telephone Company publishes a directory for Evans, which contains numerous residential, business and civic institution listings. Specifically, Evans is served by two high schools, a middle school and an elementary school, including the Evans High School and Evans Middle School, several churches including the Evans Sanctified Church, the First Baptist Church of Evans and First Pentecostal Church of Evans, and numerous businesses such as the Evans Health Care Nursing Home, U.S. Battery, Augusta Bag Company, Union Switch and Signal, Inc., and Krueger Ringier, Inc. In addition, Evans states that the community has its own post office. Therefore, it urges that Evans be allotted its first local broadcast service.

4. We believe that Evans has persuasively shown that Evans is a community for allotment purposes. Channel 222A can be allotted to Evans in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.3 kilometers (6.4 miles) northwest to avoid a short-spacing to Station WLPE, Channel 219A, Augusta, Georgia, and Station WPEH-FM, Channel 221A, Louisville, Georgia, and Channel 299C2 can be allotted to Martinez with a site restriction of 25.3 kilometers (15.7 miles) northwest to avoid a short-spacing to Station WKQB, Channel 298C, St. Georgia, South Carolina, and to unoccupied but applied for Channel 296A at Waynesboro, Georgia.[2] In its supplemental comments, Columbia requests that its license be modified to specify operation on Channel 230C3 and that Channel 299C2 be allotted to Martinez for use by other interested parties. Channel 230C3 can be allotted to Martinez in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.4 kilometers (12.0 miles) west to avoid a short-spacing to unoccupied but applied for Channel 230A at St. Matthews, South Carolina.[3]

5. Based on the above discussion, we believe the public interest would be served by substituting Channel 230C3 for Channel 232A at Martinez, Georgia, since it could enable Station WMTZ to expand its coverage area, allotting Channel 299C2 to Martinez, Georgia, as the community's second local FM service, and allotting Channel 222A to Evans, Georgia, as its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 22, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Evans, Georgia | 222A |
| Martinez, Georgia | 230C3, 299C2 |

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Columbia County Broadcasters for Station WMTZ(FM), Martinez, Georgia, IS MODIFIED to specify operation on Channel 230C3, in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. The window period for filing applications for Channel 222A at Evans, Georgia, and 299C2 at Martinez, Georgia, will open on **December 26, 1989,** and close on **January 25, 1990.**

8. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Evans Broadcasters, IS GRANTED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] After the record closed, Evans filed a response to the reply comments of Reactive Radio, accompanied by a request for their acceptance, and Columbia filed supplementary comments accompanied by a request for their acceptance. These pleadings constitute unauthorized filings since the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods. However, we find that acceptance of Columbia's supplementary comments to the extent that it demonstrates a willingness to accept modification of its license to a Class C3 allotment will serve the public interest since it provides information of decisional significance. Therefore, we will grant its request for acceptance of the supplementary comments to the extent specified herein. Evans' response to Reactive Radio's reply comments are moot in light of our action herein.

[2] The coordinates for Channel 222A at Evans are North Latitude 33-34-25 and West Longitude 82-13-44. The coordinates for Channel 299C2 at Martinez are North Latitude 33-40-30 and West Longitude 82-16-14.

[3] The coordinates for Channel 230C3 at Martinez are North Latitude 33-30-00 and West Longitude 82-16-57.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 87-568**

In the Matter of

AT&T COMMUNICATIONS
Tariff F.C.C. No. 12

Petitions for Reconsideration

## MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

**Adopted: October 26, 1989; Released: November 8, 1989**

By the Commission: Commissioner Quello concurring and issuing a statement.

### I. INTRODUCTION

1. In our *Tariff 12 Order* [1] this Commission considered whether various options in American Telephone and Telegraph Company (AT&T) Tariff 12 violated the prohibition of "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communications service, . . . " in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). We concluded that integrated service packages like those in AT&T's Tariff 12 offerings are not "like," as that term is used in Section 202(a), the individual component transmission services available on a disaggregated basis under other AT&T tariffs. This Commission also found that, because certain restrictions in AT&T's Tariff 12 offerings unreasonably limited the availability of the service packages, the tariff transmittals in question were unlawful. We therefore directed AT&T to file revisions to Tariff 12 to eliminate the unlawful restrictions on availability.[2] On May 19, 1989, Williams Telecommunications Group, Inc. (Williams) and the Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed petitions for reconsideration of the *Tariff 12 Order*. AT&T and the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed oppositions to the petitions, and IDCMA filed a reply to the oppositions. Neither petitioner seeks reconsideration of our decision to declare the provisions unlawful. Both petitioners ask us to modify the opinion to declare the tariffs unlawful for additional reasons. As discussed below, we have concluded that the petitions for reconsideration should be denied.

2. We caution interested parties against misinterpreting our denial of these petitions. Because our order below found AT&T's tariff to be unlawful, our discussion of AT&T's Tariff 12 was focused primarily upon the aspects of the tariff upon which our rejection turned. We noted, however, our expectation that both AT&T and the non-dominant carriers would continue to offer integrated service packages, given customer demand for them, and that we could expect to be called upon to review the lawfulness of such offerings in primarily two procedural settings, namely, the tariff review process for AT&T's tariff filings and the complaint process for AT&T and non-dominant carriers. Accordingly, we provided some guidance[3] regarding the statutory requirements for such offerings which we will continue to apply in evaluating these offerings.

3. We take the opportunity of this order to emphasize our commitment to the guidelines we articulated in the Order below and to clarify their application. As we stated in the *Tariff 12 Order*, the purpose of our review is to ensure that all similarily situated customers can obtain the same (or substantially similar) offerings. By customers, we mean both end users and resellers or systems integrators who would use a carrier's basic transmission services to compete with that carrier in the provision of integrated service packages. In our resolution of complaints against currently effective tariffs and in our review of future tariff filings, we expect to scrutinize closely an integrated service offering to ensure that it is not an attempt to disguise an unreasonably discriminatory offering.

4. We concluded in the *Tariff 12 Order* that AT&T's geographic restrictions were enough to require rejection of the tariff. Accordingly, we did not reach the question of the reasonableness of other potentially restrictive language in the tariffs then before us which the Bureau had questioned initially. Carriers and customers can expect this Commission to apply the guidelines strictly in the review of any such potentially restrictive language which may appear in AT&T's Tariff 12 options. The tariff structures most likely to survive our scrutiny in either the complaint or tariff review process would be those which list generic customer or service characteristics (such as minimum volumes, length of service, or traffic concentration/density patterns). The more a carrier deviates from this approach, the more closely we will scrutinize the offering.

### II. ARGUMENTS FOR RECONSIDERATION

5. Williams seeks reconsideration of our conclusion that Tariff 12 services and individual service offerings are not "like" services within the meaning of Section 202 of the Act. It contends that our finding that Tariff 12 services are not "like" other AT&T offerings is unsupported by the record and inconsistent with applicable law and precedent. Williams Petition at 1-2. Our conclusion that they are not "like," Williams argues, is flawed because we did not review the contracts underlying the various Tariff 12 offerings, and thus reached our decision without benefit of the evidence such contracts would provide regarding the relationship between AT&T and its Tariff 12 customers. *Id.* at 4. Williams compares our analysis of Tariff 12 to the analysis of the Shared Network Facilities Agreements (SNFAs) recently rejected by the Court of Appeals for the District of Columbia Circuit in *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C.Cir. 1988) (*SNFA Decision*).[4] Williams also maintains that this Commission's discussion of differences between integrated and non-integrated tariffs fails to address adequately the criteria for analyzing like services described in the District of Columbia Circuit's *Ad Hoc* decision.[5]

6. Assuming that our analysis of "likeness" is valid, Williams asserts that AT&T's Tariff 12 offerings violate this Commission's existing rules and policies, particularly

our private line rate structure guidelines[6] and our policies against restrictions on shared use and resale.[7] Williams states that Section 61.40 of this Commission's Rules, 47 C.F.R. § 61.40, requires AT&T to use consistent pricing and rate structures among its private line services unless it can justify departing from the Private Line Guidelines. Williams Petition at 11. Williams further maintains that the specificity contained in Transmittal 1592 may also conflict with this Commission's resale and shared use policies. *Id.* at 13. Certain features of the Tariff 12 offerings, such as rate structures, term requirements, and customer location restrictions, Williams contends, are likely to peg preferences to specific customers, making it unlikely that any other customer or reseller could use the offering.

7. Both AT&T and Ad Hoc challenge Williams' contention that our "like" service analysis is deficient. *See* Ad Hoc Opposition at 3-6; AT&T Opposition at 2-6. Both parties assert that our conclusions are fully supported by the record and in accord with applicable case law. AT&T disputes the argument that the *SNFA Decision* furnishes the proper guidelines for analyzing Tariff 12. AT&T Opposition at 3. It observes that the issue in the SNFA case was whether there was discrimination between services provided by the Bell Operating Companies (BOCs) under their special access tariffs and the facilities which BOCs provided under the SNFAs. Thus, AT&T argues, the comparison required by the *SNFA Decision* was between one service provided under tariff and facilities provided exclusively under contract, whereas in our *Tariff 12 Order* the comparison involved tariffed services only. *Id.* at 3-4. Therefore, AT&T concludes, Williams incorrectly relies on the *SNFA Decision* to support its argument that without the Tariff 12 contracts, this Commission remains ignorant of the terms and conditions under which Tariff 12 services are offered. *Id.* at 4. *See also* Ad Hoc Opposition at 5.

8. AT&T and Ad Hoc also deny that non-compliance with the Private Line Guidelines is grounds for rejection. AT&T Opposition at 17; Ad Hoc Opposition at 7-8. Rather, both parties maintain, compliance with the Private Line Guidelines is not mandatory. AT&T asserts that even if Williams were correct in its assertion that AT&T did not comply with the Guidelines, there would be no grounds for disturbing this Commission's Order. *Id.* at 17-18. However, AT&T claims, it has demonstrated that its Tariff 12 offerings comply fully with the Guidelines.

9. IDCMA requests that we reconsider our *Tariff 12 Order* in the light of our Computer II Rules.[8] IDCMA Petition at 2. It argues that the foundation of the *Computer II* structure, which removed the provision of customer premises equipment (CPE) and enhanced services from Title II regulation, is the requirement that common carriers provide basic transmission services under tariff on an equal basis to all customers. *Id.* at 5. IDCMA observes that in the course of our Computer II Inquiry this Commission noted AT&T's capacity to provide its own CPE customers preferential access to its regulated services in violation of Section 202(a) of the Communications Act.[9] It states that this Commission thus adopted nonstructural safeguards to ensure AT&T's CPE competitors nondiscriminatory access to AT&T's regulated services. IDCMA protests that the application of these safeguards is seriously impaired in the environment created by the *Tariff 12 Order*. *Id.* at 7.

10. AT&T asserts that IDCMA is unable to cite any rule that the *Tariff 12 Order* violates. *Id.* at 8-9. Rather, AT&T states, IDCMA speculates that AT&T will have the opportunity to engage in discriminatory practices that violate the spirit of the Computer II Rules. AT&T insists that the requirements set forth in our *CPE Order*[10] are adequate to ensure that it does not engage in discriminatory practices in the CPE market. *Id.* at 9. Even were we to address IDCMA's objections on the merits, AT&T declares, we should reject them because they are based on speculation and a misunderstanding of Tariff 12. *Id.* at 10.

11. AT&T claims that IDCMA misunderstands the nature of a Tariff 12 offering. AT&T states that an integrated service package differs from traditional services in that in the former a customer purchases a package of service functionalities which may be provided by the carrier in whatever way most effectively and efficiently meets the customer's needs. Therefore, AT&T insists, element-by-element rates in the Tariff 12 context do not exist. *Id.* at 15. AT&T contends that IDCMA's proposals that it specify conditions of eligibility, that it cross-reference Tariff 12 service elements to conventional tariff terminology, and that it specify costs for individual elements of Tariff 12 service would undermine the very nature of Tariff 12. *Id.* at 16-17.

12. IDCMA also claims that Tariff 12 violates Section 61.54(j) of this Commission's rules, which requires that general rules, regulations, exceptions, and conditions be stated clearly and definitely in the tariff. IDCMA makes several arguments in support of this claim. For example, IDCMA contends that Tariff 12 does not contain "a general rule for eligibility."[11] IDCMA also contends that AT&T has failed to publish "a number of rules and conditions that will affect the rates for, or items in, a new Tariff 12 package,"[12] such as each Tariff 12 Option's Network Provisioning Plan and the location of "Data Transmission Capabilities" in the initial option design. Absent such information in the tariff, IDCMA argues, individuals cannot determine precisely the nature and availability of Tariff 12 services.

## III. DISCUSSION

13. As noted above, Williams concurs with this Commission's ultimate finding that AT&T Tariff 12 offerings are unlawful under the Act, yet challenges our finding that Tariff 12 services are not "like" other AT&T tariffed services. Although Williams admits that we devoted "considerable attention" to the issue of like services, it charges that our conclusion is flawed because we failed to review the related contracts and misinterpreted the *Ad Hoc* decision. Williams has presented no arguments which would warrant reconsideration of our decision that Tariff 12 services are not "like" (as that term is used in Section 202(a) of the Act) other AT&T tariffed services.

14. Williams' contention that this Commission failed to adhere to the three-part test described in the *SNFA Decision* is erroneous. The *SNFA Decision* stated that in determining whether unreasonable discrimination exists, this Commission must: (1) determine whether the facilities are "like"; (2) if the facilities are like, determine whether discrimination exists; and (3) if there is discrimination, determine whether it is just and reasonable. 842 F.2d at 1307. The court stressed that in order to perform this analysis of SNFAs and special access, we would have to obtain copies of at least some of the SNFAs, which we

had not previously done. The test outlined in the *SNFA Decision* is no different from the test described in *Ad Hoc*. The *SNFA Decision* simply focuses on the need for this Commission to examine the contracts or tariffs that contain the information necessary to determine whether unreasonable discrimination exists.

15. Our *Tariff 12 Order* followed the form of analysis required by the *Ad Hoc* and *SNFA* decisions. We analyzed the functional differences between Tariff 12 services and services available under disaggregated AT&T tariffs, from a technological standpoint. In addition, we examined customer perception, the "linchpin" of the like services test,[13] and determined that the Tariff 12 offerings contain features that, from the customer's perspective, distinguish integrated offerings from disaggregated services. We concluded that the integrated packages of Tariff 12 and the disaggregated tariffs were not "like" as defined by the case law. The relevant information for comparison of two sets of tariffed services is contained in the tariffs, not in associated contracts for untariffed offerings. Thus in the Tariff 12 example, unlike the circumstances underlying the *SNFA Decision*, this Commission had before us the information necessary to determine whether Tariff 12 packages are "like" disaggregated tariffs. In the test given by the court, once we determine the services are not "like," the analysis is complete; it is only when services are found to be "like" that it is necessary to determine whether discrimination exists, and, if so, whether it is unreasonable.

16. We also reject Williams' contention that this Commission failed to develop a record that was sufficiently extensive to allow us to determine whether integrated packages are "like" disaggregated tariffs. In the investigation that preceded the *Tariff 12 Order*, the Bureau required AT&T to file an extensive Direct Case, and then permitted all interested parties ample time to comment on that Direct Case. The Index and Chronology of Filings in the Appendix to the *Tariff 12 Order* is one indication that interested parties had ample opportunity to, and in fact did, comment on the issues raised by AT&T's Tariff 12. Williams did not contribute to that record.[14] Most of the parties participating in the proceeding at earlier stages did in fact address the like services issue,[15] and this discussion, combined with this Commission's own analysis of the tariffed offerings, provided a sound basis for our finding that the services were not "like."

17. Williams' argument that Tariff 12 violates our resale and shared use policies is also misplaced. The *Tariff 12 Order* found that, by their geographic specificity, AT&T's Tariff 12 packages unreasonably discriminated among customers and were therefore unlawful. We decided that integrated service tariffs should affirmatively state that the services are generally available to customers, and declared that we would scrutinize closely any tariff language that could restrict the availability of the service to ensure that the language is not a pretext for unreasonably discriminating among customers. We noted that such restrictions, whether explicit or *de facto*, might also implicate our prohibition against unreasonable restrictions on resale. *See Tariff 12 Order* at para. 64, n.69. Accordingly, we stated that AT&T must also demonstrate compliance with our existing tariff requirements and policies, including specifically our resale policies. We have required that AT&T Tariff 12 offerings be generally available in an effort not only to forestall unreasonable discrimination but also to further our policies prohibiting restrictions on resale and shared use.

18. Similarly, we do not find grounds for reconsideration in Williams' contention that Tariff 12 fails to comply with our private line service rate structure guidelines. Williams misperceives the function of those guidelines. As this Commission made clear in adopting the guidelines, the private line rate structure guidelines never were intended to be applied inflexibly or in such a manner as to restrict unduly AT&T's ability to develop new and innovative rates and rate structures in response to competition.[16] Rather, those guidelines were adopted as "guidelines" in a literal sense, to instruct carriers how to design private line tariffs in a way that would make it easier for this Commission to determine whether terms and charges are reasonable and nondiscriminatory.[17]

19. The provision setting forth the guidelines, 47 C.F.R. § 61.40 (a), states first that this Commission uses a variety of tools in evaluating the lawfulness of tariffs.[18] Section 61.40(a) then states as a preamble to the text of the guidelines, "the carrier's burden of cost justification can be reduced when its private line rate structures comply with the following guidelines." The rule itself thus does not make compliance with the guidelines mandatory, but eases the burden of tariff justification on those carriers who do comply. Subsection (b) of the same rule reemphasizes this limited but important function of the guidelines: "The guidelines do not preclude a carrier, in a given case when a private line tariff does not comply with these guidelines, from justifying its departure from the guidelines and showing that its tariff is just, reasonable, and nondiscriminatory." 47 C.F.R. § 61.40(b).

20. In this instance, this Commission conducted a full investigation of Tariff 12. At the end of the investigation, we found the tariff unlawful on some grounds and required revisions. We properly did not find that the tariff was unlawful on the additional ground that it failed to comply with the threshold filing guidelines established in the private line structure proceeding. *Cf. Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). Williams' argument, in effect, would convert the guidelines from regulatory "tools" useful in determining whether a tariff warrants investigation, into rigid, formal requirements prescribing the structure for all private line tariffs. Our decision that the guidelines did not require us to overturn the tariff was correct and will not be reconsidered.

21. IDCMA has not identified any specific rule or requirement of our *Computer II* proceeding that it alleges is violated by any Tariff 12 tariff. Rather, IDCMA appears to be contending that the mere existence of the Tariff 12 offerings, or the possibility of future Tariff 12 offerings, makes some of the Computer II safeguards less effective. At the time this Commission adopted our *Computer II Rules*, we did not contemplate the existence of custom tariffs, and therefore did not consider whether and how these rules might apply to customized offerings. We do not, however, discern on this record any violation of our Computer II rules that would require a finding that Tariff 12 is unlawful. We reiterate that, under our Computer II and III rules, AT&T may not, in its dealings with customers or in its tariffs, condition the availability of its equipment or its transmission services upon a customer's agreement to take both. No such condition appears in Tariff 12.

22. We are unpersuaded by IDCMA's claim that Tariff 12 violates Section 61.54(j) of this Commission's rules, which requires that general rules, regulations, exceptions, and conditions be stated clearly and definitely in the tariff. IDCMA argues that AT&T has not included in its tariff a number of "rules and conditions" of service which will affect the rates and services provided under the tariff. AT&T, however, states that all relevant terms and conditions are fully set forth in Tariff 12.[19] AT&T reiterated this statement in an *ex parte* presentation made June 22, 1989, and emphasized in its notification of that meeting that the "tariff contains *all* terms, conditions and rates for VTNS."[20] Our reading of the tariff suggests no basis for questioning AT&T's characterization. Moreover, once a tariff takes effect, a carrier lawfully can only provide service subject to the terms, conditions and rates set forth in the tariff. Thus, none of the information which IDCMA claims is missing from Tariff 12 can be a prerequisite for obtaining service or be a basis for denying service.

23. By implication, certain IDCMA arguments concerning Section 61.54(j), such as IDCMA's complaint that Tariff 12 does not contain a definition of what constitutes an insubstantial difference from a currently available option, apparently are intended to underscore IDCMA's contention that Tariff 12 secures for AT&T an advantage in the provisioning of CPE that is at odds with the *Computer II* rules. Insofar as IDCMA is implying that certain of AT&T's untariffed practices are unlawful, or that our *Computer II* rules should be revisited, a proceeding other than a tariff investigation would be a more appropriate context to raise such issues.[21]

24. To the extent that IDCMA's concerns relate solely to possible ambiguities in Tariff 12 language, however, we note that it is this Commission's historic practice to resolve questions about the meaning of tariff language in favor of the customer. We shall continue this practice with regard to Tariff 12, should such questions arise.

25. For example, we shall construe the absence of specified geographic locations in the tariff as an assurance that Tariff 12 options are available at any AT&T location. Therefore, requests for arrangements to provide custom-designed service configurations, when otherwise comparable to existing Tariff 12 options, would not represent a substantial difference (justifying AT&T's denial of service) simply because the request for service specifies different locations than those involved in the provision of service to the existing customer(s).

26. Similarly, whatever the role of the Network Provisioning Plan with regard to the technical arrangements for service provisioning or contractual negotiations between AT&T and prospective customers, no aspect of such a plan constitutes an eligibility requirement that restricts the general availability of Tariff 12 options.[22] Moreover, although Tariff 12 options may continue to reflect customer commitments in excess of a year, as such extended terms are one attribute distinguishing these arrangements from shorter-term alternatives, we do not regard variations in multi-year commitments as constituting a substantial difference in the service provided. Thus, while a Tariff 12 option initially offered and priced on the premise of a particular term (*e.g.*, 3 years) might be priced differently for a customer seeking a different term (*e.g.*, 10 years), this is a reasonable modification that AT&T should be prepared to make.[23]

## IV. CONCLUSION; ORDERING CLAUSES

27. For the reasons set forth above, we conclude that petitioners' requests for reconsideration of our *Tariff 12 Order* should be denied.

28. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by Williams Telecommunications Group, Inc., and by the Independent Data Communications Manufacturers Association, Inc., in the above-captioned proceeding ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, FCC 89-116, released Apr. 18, 1989 (*Tariff 12 Order*), *petition for review pending, MCI Telecommunications Corp. v. FCC*, No. 89-1382, et al. (D.C. Cir. filed June 15, 1989).

[2] *Id.* at para 53. In response to our Order, AT&T filed Transmittal No. 1592 on May 4, 1989. The Common Carrier Bureau denied petitions to reject or suspend that transmittal, thus allowing the tariff revisions to take effect on July 1, 1989. *See* AT&T Communications, Transmittal No. 1592, DA 89-743, released June 30, 1989.

[3] *See Tariff 12 Order* at paras. 60-69.

[4] Williams Petition at 5.

[5] *Id.* at 6-8. *See* Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790 (D.C. Cir. 1982) (*Ad Hoc*).

[6] Private Line Rate Structure and Volume Discounts, CC Docket No. 79-246, 97 FCC 2d 923 (1984) (*Private Line Rate Structure*).

[7] *See* Regulatory Policies Concerning Resale and Shared Use, CC Docket No. 80-54, 83 FCC 2d 167 (1980) (*Resale Order*).

[8] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), Final Decision, 77 FCC 2d 384, *recon.*, 84 FCC 2d 50 (1980), *Further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, FCC No. 84-190, released May 4, 1984.

[9] IDCMA Petition at 6 (citing Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, 102 FCC 2d 655, 690 (1984) (*AT&T CPE Order*), *recon.* 104 FCC 2d 739 (1986)).

[10] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, 102 FCC 2d 655 (1985) (*CPE Order*), *recon.*, 104 FCC 2d 739 (1986).

[11] *IDCMA Petition at 14.*

[12] *Id.*

[13] *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982).

[14] As AT&T states in its Opposition, this Commission's policy is that parties filing petitions for reconsideration ordinarily should have filed pleadings at an earlier stage of the proceeding. *See AT&T Opposition* at 1 n. **, *citing* Section 1.106(b)(1) of

this Commission's Rules, 47 C.F.R. § 1.106(b)(1). Our Rules provide, however, that "[i]f the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." Williams has not made the requisite good cause showing regarding its earlier failure to participate. Nevertheless, in light of the fact that there is another petition for reconsideration properly pending before us, and in order to clarify any possible uncertainty regarding our Order, we will take this opportunity to address the matters raised by Williams.

[15] *See Tariff 12 Order* at paras. 14-20.

[16] *See Private Line Rate Structure*, 97 FCC 2d at 925 (Commission retains discretion to apply guidelines flexibly), 951-52 (separate statements of Commissioners Quello and Dawson underlining their understanding that guidelines would not be applied in doctrinaire or unduly restrictive manner).

[17] *See, e.g., Private Line Rate Structure*, 95 FCC 2d 923.

[18] In analogous contexts, the courts have held that when an agency has adopted rules or guidelines as tools to assist it in the exercise of its functions, a failure by a party to comply strictly with those rules or guidelines does not require the agency to act adversely to that party's interests. Rather, if the rules or guidelines are designed to provide the agency with information of a kind or in a format that is useful in performing agency functions, the agency in its discretion may determine that the information supplied is sufficient for its purposes, even if it is of a different kind or format. *See, e.g., American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538-39 (1970); *Associated Press v FCC*, 448 F.2d 1095, 1104 (D.C. Cir. 1971). The *Associated Press* case involved rules similar to the private line guidelines, which required carriers to furnish certain data in support of tariff filings. The court held that strict compliance with those rules was not required, and that the Commission in its discretion could accept tariffs that were not filed with such data if it determined that it had sufficient data to perform its functions. *Associated Press*, 448 F.2d at 1104.

[19] *See* AT&T Opposition at 20.

[20] Letter from T. Norris, AT&T, to Secretary, FCC, June 22, 1988 [sic].

[21] We note that none of the issues raised by IDCMA in the instant proceeding, including those concerning Section 61.54(j), were designated for investigation. The choice of issues for investigation in a Section 204 proceeding is wholly within the discretion of this Commission; parties may not dictate the subject of investigations. Moreover, it would be unfair to the carrier whose tariff is being investigated for this Commission to decide issues other than those designated for investigation because that carrier would not have had an opportunity to address those issues in its Direct Case.

[22] Section 211(b) of the Act provides this Commission the authority to require AT&T to file its Network Provisioning Plan(s). 47 U.S.C. § 211(b). Should circusmstances arise in which such a filing is warranted, we will not hesitate to exercise this discretionary authority.

[23] *See Tariff 12 Order* at para. 56.

## CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

IN RE: AT&T Communications, Tariff F.C.C. No. 12, Petitions for Reconsideration

I am concerned that in the process of "clarification," the Commission is potentially becoming more restrictive in its criteria for reviewing Tariff 12 offerings. I have been advised by the Common Carrier Bureau that this "clarification" does not alter our approach to analyzing Tariff 12 offerings. Nevertheless, to the extent that such a perception would add uncertainty to the marketplace, I believe that it would be a step backward in the Commission's efforts to be even-handed in its regulation of the interexchange markets.

Therefore, I concur.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-471**

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 1215

Tariff F.C.C. No. 15
Competitive Pricing Plans;
Holiday Rate Plan

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 26, 1989; Released: November 8, 1989**

By the Commission: Commissioner Quello concurring and issuing a statement.

1. This investigation was established to examine the lawfulness of AT&T Communications' (AT&T) Tariff 15 offering of Competitive Pricing Plans, and its specific offering of the Holiday Rate Plan (HRP) to Holiday Corporation, the Nation's largest hotel chain. Each Competitive Pricing Plan would offer telecommunications service to a specific customer at rates established to respond to competition. Under HRP, for example, AT&T offered Holiday discounts of 5 to 10 percent from the rates for AT&T's PRO America II services. AT&T justified the discount as a competitive response to an off-tariff discount offer made to Holiday by MCI Telecommunications Corporation (MCI). Fourteen of AT&T's competitors and a group representing small telephone exchange companies petitioned for rejection or investigation and suspension of the offering, arguing primarily that a discount to a single named customer is unlawfully discriminatory, not justified for HRP on the facts, and in conflict with Commission Rules and policies.

2. Tariff 15 represents AT&T's intended framework for its Competitive Pricing Plans, offering individually priced rates designed to meet other carriers' competitive offerings. HRP offers Holiday Corporation a progressive discount from the PRO America II rates AT&T offers in its Tariff F.C.C. No. 1. PRO America itself is an optional calling plan under which customers obtain discounted interstate long distance voice service, subject to a fixed monthly fee. It is designed for business customers who have calling volumes that are larger than a typical MTS customer, but smaller than the volume that would justify obtaining WATS or other services, or who desire detailed billing and other features not available with WATS.

3. HRP provides PRO II to Holiday at a further discount based upon volume. At the time HRP was filed, Holiday owned 174 hotels, operated 24 others under a management contract, and franchised 1,657 hotels to 756 independent franchisees. Holiday and each of these franchisees was eligible for HRP. Each would pay a flat monthly charge of $72 per account, *i.e.*, per location. Each interstate customer-dialed or 1+ call[1] would then be discounted from the PRO II rates by from 5 to 11 percent depending upon volume, with a maximum total discount of 10 percent of total revenues.

4. In its justification of these discounts, AT&T explained that MCI recently entered into negotiations with Holiday to replace AT&T as Holiday's carrier for 1+ traffic at all corporate and franchise locations. AT&T claimed that MCI offered to provide 1+ service at off-tariff rates substantially below either MCI or AT&T's existing tariffed rates. Holiday had replaced AT&T with MCI on a trial basis at several hundred Holiday hotels and informed AT&T it would make the trial arrangements permanent at all or nearly all Holiday locations unless AT&T offered a substantially more competitive price for 1+ service.

5. AT&T contended in its tariff transmittal that HRP was justified under the established principle of competitive necessity, citing Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984). Petitioners, including MCI and other AT&T competitors, challenged this contention, arguing primarily that offering substantial discounts to a single, named customer is unreasonably discriminatory under Section 202(a) of the Communications Act and violates prior Commission decisions and Orders. Those petitioners also claimed that AT&T's filing constitutes an attempt to attack collaterally Commission decisions designating AT&T as a dominant carrier possessed of market power and subject to constraints not applicable to non-dominant carriers.

6. Further, MCI asserted both that AT&T is incorrect as to material aspects of MCI's offer to Holiday, including the price, and that HRP would result in charges substantially below MCI's offer.

7. We decided to investigate this AT&T tariff transmittal to determine whether the Holiday Rate Plan violates Section 202(a) of the Communications Act. The Investigation Order noted that competitive necessity is a well-recognized justification for tariffs that would otherwise be considered unreasonably discriminatory, but none of the pleadings had addressed Supreme Court decisions concerning the lawfulness of offers to single customers under competitive necessity. *See L. T. Barringer & Co. v. United States*, 319 U.S. 1 (1943); *Seaboard Air Line Ry. Co. v. United States*, 254 U.S. 57 (1920); *Wight v. United States*, 167 U.S. 512 (1987). The pleadings also did not provide a basis for resolving the important legal, policy, and factual issues raised by HRP and other offers to individual customers, in the context of the technological, economic, and market characteristics of modern telecommunications. Both AT&T and MCI were made parties to this investigation and they along with US Sprint were directed to provide information to aid in the investigation.

8. Following resolution of several preliminary motions, Direct Cases were filed on October 20, 1988, by AT&T and MCI. MCI requested confidential treatment for much of the support information it submitted, including the terms of its offer to Holiday Corporation, which it had not disclosed in its earlier filings. The terms of the MCI Holiday offer were, however, subsequently made public following a request for disclosure under the Freedom of Information Act. Oppositions and rebuttals were filed on December 5 and December 20, 1988.

9. The Direct Cases furnished additional information concerning the level of competitive activity in single-customer offers. Those pleadings and the subsequent filings also contain further discussion of legal and policy issues. We have concluded that it would not be necessary or desirable to resolve all of the questions that were originally designated for consideration in this Order. Therefore, we are not including a complete summary of pleadings in the Order. Those pleadings are, however, summarized in detail in the Appendix.

10. The record developed in response to the Investigation Order reveals additional facts about the activities of the competing carriers that make the appropriate resolution of this controversy at this time narrower than this Commission expected when the Investigation Order was adopted. The Investigation Order assumed that AT&T filed a customer specific tariff in response to a customer specific MCI offer and that we were accordingly required to determine whether such a competitive response could be lawful.

11. The MCI Direct Case asserts that MCI did not in fact make an offering to Holiday that is not available to other MCI customers. MCI says that its offer to Holiday included "volume, term, and other commitments - with corresponding obligations in the event of breaches of those commitments - not applicable to customers subscribing to standard tariffed service offerings." MCI Direct Case at 40. MCI also says that it made substantially similar offers, consistent with internal MCI guidelines, to other customers willing to make such commitments. *Id.* at 42.

12. AT&T disputes that assertion. AT&T notes that MCI merely claims the other offers were "substantially similar" to the MCI Holiday offer. AT&T asserts that MCI had not in fact extended MCI's Holiday offer to a single other customer.

13. The MCI Rebuttal responds (p.43) by stating: "As represented elsewhere, MCI will provide service to any entity under the terms and conditions, including price, set forth in these offers, as this is nothing more or less than MCI was willing to do at the time its offers were extended to Holiday Corporation this past March, and thereafter." MCI also formally incorporated its offer into the record and stated that it was "announcing their availability to the general public." *Id.* at 45. MCI contends that the fact that its offers to Holiday are publicly known and generally available "whether by tariff or otherwise -- is absolutely fatal to AT&T's position as to the legality of restricting its Holiday Rate Plan to Holiday Corporation and [AT&T] concedes as much." *Id.* at 46 n. 86.

14. The additional information now of record thus indicates that our initial understanding of the situation, that both the MCI and AT&T offers were limited to Holiday, at least is not currently accurate. MCI's offer is now a general one to all customers willing to accept the same commitments. One of those commitments was a one year term, which was matched by AT&T's offer to Holiday. Since the expiration of that term, Holiday receives service on a month-to-month basis and HRP continues to be restricted to Holiday. AT&T has not modified its tariff to make HRP as broadly available as MCI's competing offer. Thus, while we had initially assumed that, to make a determination in this proceeding, it was necessary to examine the lawfulness of single customer offers by MCI, this is not the case now. Prospectively, the issue is whether a single customer offer is justified by competitive necessity as a response to a competitor's general offer.

15. This Commission described the standards for a competitive necessity justification in the *Private Line/Volume Discount* Order. Although this is not a private line tariff, the competitive necessity doctrine has a broader application than private line services. We note MCI's contention that the standards in the *Private Line/Volume Discount Order* are not applicable, but we do not find that contention persuasive.

16. The *Private Line/Volume Discount Order* said:

> A carrier's proof should include a showing that (1) an equal or lower priced competitive alternative - a similar offering or set of offerings from other common carriers or customer-owned systems - is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users. We will assess the adequacy of the competitive-necessity justification on a case-by-case basis until we are able to develop additional standards in this area.

97 FCC 2d at 948.

17. Based upon the record as it has been developed in this investigation, we need only consider the second prong of this test, whether the terms of the discounted offering are reasonably designed to meet competition without undue discrimination. In its initial petition to reject HRP, MCI did not disclose the specifics of the MCI offer. MCI Petition at 11 n. 17. It was only in the course of the investigation pleading cycle that MCI was required to make public its actual offer to Holiday and that the nature of its offer became clear. More importantly, MCI for the first time unambiguously stated that it would offer the same terms to other customers on request.

18. Under the present circumstances, AT&T's continuing offer of the HRP discount only to Holiday is not justifiable on grounds of competitive necessity because the customer specific nature of the AT&T offering violates the principle that "the terms of the discounted offering [must be] reasonably designed to meet competition without undue discrimination." 97 FCC 2d at 948. Thus, even if the competitive necessity doctrine might have justified AT&T's customer specific offering at the time the transmittal was filed, AT&T would have been justified only in offering to meet MCI's offer, including its one year term. Such a justification, assuming that MCI's original offer was limited to Holiday, no longer applies. AT&T cannot continue to justify its customer specific tariff as a competitive response to an MCI offering that clearly now is generally available. A discrimination that extends beyond that practiced by the competitor is undue, as MCI argues and AT&T appears not to dispute. The affirmative defense of competitive necessity under the Communications Act does not create a right to introduce discrimination not present in the offer to which the carrier is responding. We conclude that the AT&T HRP tariff is not lawful at this time and accordingly must be modified on a prospective basis.[2]

19. The same result would be reached under the Robinson-Patman Act cases that AT&T cites as controlling. The competitive necessity justification for otherwise unlawfully discriminatory rates continues, under that Act, only to the extent of the competing offer: "the response may continue only as long as the competitive circumstances justifying it, as reasonably known by the seller, persist (footnote citations omitted)." *Falls City Industries v. Vanco Beverage*, 460 U.S. 428, 450 (1983). *See also Checker Motors Corp. v. Chrysler Corp.*, 283 F.Supp. 876 (S.D.N.Y. 1968), *aff'd* 405 F. 2d 319, *cert. denied*, 394 U.S. 999. AT&T's discriminatory rates cannot indefinitely be justified based on competitive necessity, if the competitor's offer is no longer restricted to the customers who benefit from the discrimination that was originally designed as a competitive response.

20. Our conclusion should not be construed as implying that the Holiday Rate Plan was or was not lawful at the time it was filed. Under the facts and events in this investigation, it is no longer necessary that we address that issue in order to conclude that HRP is at least now unjustified and unlawful. Moreover, while we designated broader issues in the *Investigation Order*, we also judge that it will be administratively more effective and productive to examine such issues in a separate, broader proceeding, rather than one focused largely upon this specific set of facts.

21. Accordingly, the record in this investigation requires the conclusion that the continuing offer of the discounted HRP rates is unlawfully discriminatory and that this discrimination must be ended. Discrimination in the rates charged different customers can, logically, be ended by extending the preferential rate to all customers, applying a general rate to the preferred customer, or adopting some intermediate, general rate. There is no obvious reason to require AT&T to adopt one of these solutions in preference to the others. We will direct AT&T to file tariff revisions eliminating the unlawful discrimination within 30 days of the release of this Order by means of a tariff transmittal, filed upon 45 days' notice.

22. ACCORDINGLY, IT IS ORDERED that the Holiday Rate Plan, Transmittal No. 1215 and all subsequent amendments, IS FOUND TO BE UNLAWFULLY DISCRIMINATORY under Section 202(a) of the Communications Act. AT&T Communications is directed to file tariff revisions removing the Holiday Rate Plan, Transmittal No. 1214 and all subsequent amendments in conformance with this Opinion and Order no later than 30 days from the date of release, upon 45 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] A call is described as a "1+" call if the customer dials the numeral "1" and then the area code and the called party's local telephone number, to complete the call directly on a station-to-station basis. "1+" traffic does not include operator-assisted calls. In an operator-assisted call the customer dials the numeral "0" and the operator either dials the number or provides billing to another number or some other assistance.

[2] AT&T suggested in an *ex parte* statement that HRP could not be found unlawful prospectively without a further investigation giving it the opportunity to raise new justifications. Letter from B.H. Walling, Jr., AT&T to Secretary, F.C.C., dated March 14, 1989, Attachment at 9. We reject that argument because the record as it stands is sufficient to find that HRP, as a customer-specific offering, no longer can be justified as a competitive response. AT&T has had a full opportunity in this investigation to present whatever justification it chooses for its rates.

**CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO**

IN RE: AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plans; Holiday Rate Plan

The Commission finds itself in the rather awkward situation of dealing with a phantom tariff offering to which no one subscribes as a justification for finding unlawful a continuation of the Holiday Rate Plan. MCI discovered, somewhat belatedly, that its offering to Holiday was a general offering available to anyone similarly situated to the Holiday Corporation. *See MCI Rebuttal* at 45 (December 20, 1988).

Admittedly, we all have a genuine concern that single customer offerings might be found to have negative public policy implications. The fact is that single customer offerings are routinely being made by non-dominant carriers as they aggressively compete for business among the nation's largest telecommunications users.

The record before us in this tariff investigation may obscure more than it reveals. I find it very difficult to determine that the result is incorrect.

Therefore, I concur.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 31, 1989

## FCC ANNOUNCES 1990 MAXIMUM REIMBURSEMENT FEE FOR AN AMATEUR OPERATOR LICENSE EXAMINATION

The FCC announced today that effective January 1, 1990, the maximum allowable reimbursement fee for an amateur operator license examination will be $4.96. This amount is based upon a 4.3% increase in the Department of Labor Consumer Price Index between September 1988 and September 1989.

Volunteer examiners (VEs) and volunteer-examiner coordinators (VECs) may charge examinees for out-of-pocket expenses incurred in preparing, processing, or administering examinations for Technician, General, Advanced and Amateur Extra Class operator licenses. The amount of any such reimbursement fee from any examinee for any one examination session, regardless of the number of elements administered, must not exceed the maximum allowable fee. Where the VEs and the VEC both desire reimbursement, they jointly decide upon a fair distribution of the fee.

No fee is allowed for the Novice Class operator license examination.

This announcement is made pursuant to Section 97.527 of the Commission's Rules, 47 C.F.R. § 97.527.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

C4 MEDIA CABLE SOUTH,
Complainant,

v.

| | |
|---|---|
| LANCASTER TELEPHONE COMPANY, | File No. E-89-64 |
| ROCK HILL TELEPHONE COMPANY, | File No. E-89-82 |
| FORT MILL TELEPHONE COMPANY, | File No. E-89-83 |
| CATAWBA SERVICES, INC., | File No. E-89-240 |
| VIDEO VISION, INC., | File No. E-89-241 |
| CAROLINA TELECOM, INC., | File No. E-89-242 |
| FRANK S. BARNES, JR., | File No. E-89-243 |
| JOHN M. BARNES, | File No. E-89-244 |
| EDWIN L. BARNES, | File No. E-89-245 |
| LADSON A. BARNES, JR., | File No. E-89-246 |
| PALMETTO CABLE TV, INC., and | File No. E-89-247 |
| WILLIAM BEATY, Defendants. | File No. E-89-248 |

ORDER

**Adopted: November 2, 1989; Released: November 8, 1989**

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. C4 Media Cable South, Limited Partnership (complainant) has requested dismissal, with prejudice, of its complaints in the above-captioned proceedings on the grounds that the parties have reached a settlement of the underlying dispute. All defendants concur in complainant's motion. For the reasons set forth below, the motion is granted.

2. This proceeding was initiated by a formal complaint filed by complainant against Lancaster Telephone Company on December 23, 1988 alleging violations of Sections 214(a) and 613 of the Communications Act and Sections 63.01 and 63.56 of the Commission's Rules. Complainant subsequently directed further complaints against certain other telephone companies, cable television companies, and principals thereof (defendants). Defendants denied the allegations and moved to dismiss the complaints. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties have reached a settlement that resolves the matters in controversy.

3. On the basis of the statements contained in complainant's motion, we conclude that there are no longer issues in controversy and that the proceeding should be terminated. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. §§ 0.291, that "Complainant's Motion to Dismiss" filed November 1, 1989, IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints are DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-88-32

MATANUSKA TELEPHONE
ASSOCIATION, INC.,
Defendant.

**ORDER**

**Adopted: October 27, 1989; Released: November 8, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 30, 1987, AT&T Communications (AT&T) filed a formal complaint against Matanuska Telephone Association, Inc. (Matanuska) alleging certain statutory and tariff violations associated with defendant's billing and collection rates for the period November 1, 1985, to December 31, 1986. Upon motion by AT&T, Alascom, Inc. (Alascom) was joined as a third party plaintiff. *AT&T v. Matanuska Telephone Ass'n, Inc.*, 4 FCC Rcd 544 (1989).

2. The parties to the above-captioned complaint have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On October 17, 1989, counsel for AT&T and Matanuska filed a joint motion seeking dismissal of the complaint with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY
Revisions to Tariff F.C.C. No. 68

Transmittal No. 1815

## MEMORANDUM OPINION AND ORDER

**Adopted: October 13, 1989; Released: October 13, 1989**

By the Chief, Common Carrier Bureau:

### I. INTRODUCTION

1. On June 15, 1989, Southwestern Bell Telephone Company (SWB) filed the above-captioned transmittal to increase the access rates which became effective in April 1989. The rates that SWB originally filed were reduced in accordance with our annual access Order released March 22, 1989.[1] The majority of other local exchange carriers (LECs) subject to the *1989 Access Order* previously filed tariff transmittals to increase access rates that reflected partial authorizations in that Order. Those transmittals were addressed in our Order released June 22, 1989.[2] The *1989 Review Order* described the basis for our analysis of the transmittals filed by the majority of LECs, and we use the same analysis here.

### II. BACKGROUND

2. By Transmittal 1815, SWB challenges two aspects of the *1989 Access Order*. It disputes the partial allowance for regulated wiring, and the transmittal increases SWB's special access rates based upon an alleged revenue shortfall resulting from the crossover ratio for 1.544 Mbps high capacity (DS1) service adopted by the Bureau. On June 30, 1989, MCI filed a petition to suspend and investigate (MCI Petition), and SWB replied on July 12, 1989 (SWB Reply).

#### A. *Inside Wiring Increase*

3. SWB states that the *1989 Access Order* did not allow for the recovery of approximately $16.1 million in regulated wiring expenses. SWB now files to collect approximately $12.4 million of that amount. [3] SWB's request is based on a forecast indicating that approximately 64.9 percent of the expenses SWB records in Account 6362, other Terminal Equipment Expense, will be regulated. SWB avers that its positioning of the demarcation point between regulated and nonregulated wiring, its accounting for inside wiring expenses, and its reporting procedures for inside wiring maintenance are consistent with the Commission's rules. SWB D&J at 2.

4. SWB further asserts that although all inside wiring expenses are recorded in Account 6362, that account also includes expenses relating to regulated network terminating wire, which SWB defines as the wire that runs from the protector up to and including the standard network interface (SNI). SWB avers that the Commission rules allow the LECs to select the demarcation point between regulated and nonregulated wire according to normal telephone company practices. SWB notes that an analysis of SWB's Account 6362 shows that the Commission's concern with the reporting of inside wiring expenses applies to only 26 percent of SWB's total Account 6362 expenses. *Id.* at 3-5.

5. SWB explains that the determination of nonregulated expenses is governed by SWB's cost allocation manual, which was filed by SWB and conditionally approved by the Commission on January 29, 1988. SWB asserts that the Commission has found SWB's cost manual reasonable,[4] and that an independent auditor recently stated in an attestation audit that SWB complies with the Commission's cost allocation criteria. SWB thus concludes that its accounting for inside wiring is justified and argues that its 1989 prospective view of Account 6362 is in accordance with Commission procedures. *Id.* at 5-7.

6. SWB next supplies more information regarding its reporting procedures to support additional Account 6362 expenses. SWB contends that it made a good faith effort to comply with all of the Bureau's data requests which preceded the *1989 Access Order*. SWB also asserts, however, that the data requests sought information which could not be extracted from SWB's records. SWB states that a time and motion study would provide more relevant information to the Commission, and that an on-site audit of activities would have assured the Commission that SWB's procedures were proper. SWB states that its response to one of the prior data requests classified certain functions as regulated even though its cost manual allocates those costs between regulated and nonregulated activities. This error occurred, according to SWB, because its field technicians do not have the ability to allocate their time. Therefore, SWB states, the field technicians must directly assign all their time to either regulated or nonregulated activities. All allocations, asserts SWB, are performed through the cost manual process. *Id.* at 7-9.

7. SWB also asserts that its field reporting guidelines are specific and result in the accurate reporting of functions performed in the isolation of inside wiring, customer premises equipment (CPE), and network problems. SWB argues that it utilizes a single set of guidelines for the reporting of travel time, which require the reporting of activities to unique and discernible field reporting codes (FRCs). SWB attaches a copy of its guidelines, describes the required reporting procedures, and argues that the guidelines are clear and in accordance with Commission policies. *Id.* at 9-14.

8. SWB further states that its guidelines currently assign solely to regulated activities the costs of no access (NA) trouble reports, whenever field technicians are unable to gain access to the customer premises, and no trouble found (NTF) trouble reports, whenever field technicians are unable to determine the cause of the trouble after gaining access to the premises. SWB concedes, however, that it is reasonable to assume that some of the trouble reports that cause these situations could have originated with nonregulated problems, and is therefore willing to assign some of these costs to nonregulated activities in the future. SWB does not attempt to do that at this time, however, and argues that the amount involved is insignificant and would not have an impact on its overall revenue requirement. *Id.*

9. Finally, SWB notes that the Bureau determined, in the *1989 Access Order*, that SWB systematically overstated its regulated inside wiring costs, and later required revisions to SWB's cost manual. SWB states that it filed these cost manual revisions on May 31, 1989. SWB provides a calculation of the effect of these revisions on its revenue requirement. This restatement shows revised disallowances of $3.7 million, resulting in SWB's claim that $12.4 million of the $16.1 million of inside wiring expense which was not allowed by the Bureau should be allowed. *Id.* at 14-17.

**B.** ***Special Access Increase***

10. SWB contends that the Commission's direction in the *Strategic Pricing Order* [5] to revise voice grade and DS1 special access service rates in order to effect an 8-to-1 crossover ratio was not based upon any disallowed revenue requirement, but only on an adjustment of rate relationships. According to SWB, this led to a revenue shortfall for the carrier. SWB asserts that this DS1 revenue shortfall is a result of Commission notice requirements --revisions could not have been put in place on one day's notice -- and not due to any partial allowances in the *1989 Access Order*. *Id.* at 17- 19.

## III. SUMMARY OF PLEADINGS

**A.** ***Inside Wiring Increase***

11. MCI asserts that SWB has failed to address the Commission's concerns regarding inside wiring. MCI notes that although the Bureau recognized that more accurate results may be obtainable through an alternate analysis of inside wiring, it also stated that such methods could not be used because the LECs had overstated regulated wiring expenses, and because of other defects. MCI challenges SWB's placement of the demarcation point, stating that although the Commission has left the LECs flexibility in placing that point, it is unreasonable for a LEC to choose a point which always places the highest cost on the regulated portion. MCI states that it does not understand the large proportion of expenses that SWB assigns to regulated activities, and avers that SWB has failed to justify the difference between its allocation and that of other LECs, such as the BellSouth Telephone Companies (BellSouth). MCI Petition at 1-5.

12. MCI also asserts that SWB has failed to correct any of the problems associated with SWB's field reporting instructions which were identified by the Bureau in the *1989 Access Order*. These include problems raised by reporting instructions for the installation of SNI devices at the time nonregulated wire is repaired, and classification of all NA or NTF expenses as regulated. *Id.* at 5-6. MCI further notes that although SWB admits that it continues to miscategorize all NA and NTF expenses to the regulated jurisdiction, and offers to change its cost manual to correct this problem only prospectively, it still seeks a rate increase. SWB also admits that it did not provide the information the Bureau's data request sought, according to MCI, in violation of Commission requirements. *Id.* at 6-7. MCI thus requests the Commission to suspend and investigate SWB's tariff revisions until such time as SWB provides the necessary information. *Id.* at 8.

13. In its reply, SWB argues that the Bureau used the 32 percent ratio for regulated expenses in Account 6362 only because it was the "best available estimate,"[6] and that alternate methods may achieve more accurate results. SWB Reply at 3. The recent *1989 Review Order* evidences the Commission's willingness to accept improved information and demonstrations of proper inside wiring allocations, argues SWB, citing specific examples of such increased allowances. *Id.* at 4-5. SWB avers that MCI's criticisms of its request are invalid in that MCI fails to recognize that, unlike SWB, BellSouth assertedly does not record expenses relating to network terminating wire in Account 6362, contributing to the higher relative ratio of regulated expense in SWB's Account 6362.[7] In addition, SWB criticizes MCI's arguments regarding the placement of the SNI and customer provision of network terminating wire, stating that LECs are allowed to choose SNI placement, and that significant network terminating wire can exist between the protector and the SNI in multitenant complexes. *Id.* at 5-7.

14. SWB also attempts to counter MCI's criticisms of its reporting and accounting procedures for inside wiring, arguing that there is only one set of instructions for reporting travel time, and that SWB has clarified its earlier response to a Commission data request regarding the reporting and allocation of field work expenses. SWB asserts that field technicians directly report repair time, and that all allocations are done through the cost manual. In any event, SWB states, the occurrence of both regulated and nonregulated trouble in a visit is only 8/10 of 1 percent of total visits. *Id.* at 8-11. With respect to NA and NTF visits, SWB avers that it recognizes the problem, but that there is a "reasonable expectation" that the portion that should be assigned to nonregulated activities should be small given the low rate of occurrence of NA and NTF visits. Finally, SWB argues that its independent auditor found no problems in its accounting procedures. *Id.* at 11-12.

**B.** ***Special Access Increase***

15. MCI asserts that SWB's revenue requirement was never approved by the Commission, and that the Commission disallowed the $1.5 million special access revenue requirement that SWB now seeks to spread across all special access rates. MCI asserts that SWB must justify an increase in revenue requirement. *Id.* at 8-9.

16. In reply to MCI's arguments regarding the DS1 revenue shortfall, SWB argues that the *1989 Access Order* required SWB to revise its proposed rate levels, based upon required rate relationships, and that this did not represent a revenue requirement determination. SWB asserts that the Commission approved its revenue requirement, and that SWB simply did not recover the approved revenue requirement. *Id.* at 13-14.

## IV. DISCUSSION

**A.** ***Inside Wiring***

17. The *1989 Access Order* disallowed approximately $16.1 million of the interstate revenue requirements SWB had forecast for regulated wiring. That disallowance reflected our determination that for purposes of that Order no more than 32 percent of SWB's balance in Account 6362 should be considered regulated. We found that this 32 percent factor, which was derived from forecast data filed by BellSouth, constituted "the best available estimate of the proper allocation of inside wire expenses to regulated activities" for SWB and other LECs.[8] This Bureau

applied this 32 percent factor to the total wiring expense SWB had forecast for Account 6362 to determine the portion of that expense that should be classified as regulated.

18. In applying the 32 percent factor, we recognized that alternative methods of determining regulated wiring expenses might achieve more accurate results. This Bureau was unable to use those methods to determine SWB's regulated wiring expenses, however, because SWB's regulated wiring forecast was based on an internal accounting system that systematically overstated regulated data wiring costs and because SWB was unable to provide reliable data regarding the activities of its field technicians.[9] In these circumstances, we could not determine, through any method other than a benchmark comparison, the percentage of the costs that SWB had forecast for Account 6362 that should be classified as regulated.[10] We stated, however, that SWB would remain "free to present [an] improved, more credible demonstration of proper inside wire allocations."[11]

19. In its D&J, SWB attempts such a demonstration and seeks an additional $12.4 million allowance for regulated wiring. This request is based on 1988 time reporting results under which 74.6 percent of SWB's wiring expenses in Account 6362 were classified as regulated. SWB reduced this by 9.7 percent of the account total to adjust for certain deficiencies we found in its cost manual. However, SWB acknowledges that its internal accounting procedures assign to regulated activities a disproportionate percentage of the time spent responding to NA and NTF trouble reports.[12] Since SWB proposes no adjustment for this defect, we must conclude that its request for an additional $12.4 million allowance is excessive.

20. In addition, in requesting that additional allowance, SWB assumes that its time reporting system generates reliable data on the percentage of field technician time that should be classified as regulated. In the *1989 Access Order*, we questioned whether SWB had provided its field technicians with adequate guidance on time reporting. We found that SWB had given its technicians contradictory instructions on the treatment of travel time, and then reported to the Commission that the technicians used these instructions to determine how to record testing and repair time.[13]

21. In the instant transmittal, SWB presents an interpretation of its instructions for recording travel time and argues, on the basis of that interpretation, that the instructions provide field technicians with clear guidance on time reporting. We believe, however, that those instructions are susceptible to other interpretations. For example, the instructions state that travel time exceeding 15 minutes should be reported to the "code appropriate for the work for which the traveling was done"[14] and to the code "applicable to the first productive function performed at the new job."[15] We continue to find these instructions contradictory.[16]

22. Even if we were to assume that SWB's field technicians share its interpretation of the time reporting instructions, we would not be convinced that 64.9 percent of the expenses SWB forecasts for Account 6362 will be regulated since SWB fails to examine its field technicians' actual time reporting practices. Absent such an examination, we cannot conclude that the field technicians properly implement SWB's time reporting system, as interpreted in SWB's filings.[17]

23. SWB has also failed to provide data that would allow us to calculate precise adjustments to allocate NA and NTF costs properly, and to reflect contradictions in the instructions SWB gives its technicians and errors in the technicians' implementation of those instructions. Despite this failure, we are convinced that the 32 percent factor used in the *1989 Access Order* produces unreasonably low regulated wiring allowances for SWB. Any additional adjustment for NA and NTF calls would be small in comparison to the difference between that factor and SWB's 64.9 percent figure.[18] Furthermore, our review of SWB's internal procedures makes clear that contradictions in the instructions SWB gives its technicians and errors in the technicians' implementation of those instructions are unlikely to cause differences between reported and actual results sufficient to reduce SWB's regulated percentage to the 32 percent range.

24. In the *1989 Review Order*, the Bureau granted Ameritech an additional partial allowance for regulated wiring on the basis of a showing that two adjustments to the forecast data included in the 1989 access tariff filing would produce reasonable results. The first of these adjustments substituted Ameritech's time reporting results for the first three months of 1989 for the 1988 data used in its 1989 access tariff filing. We found this adjustment appropriate because the 1989 data reflected improvements Ameritech had made during 1988 in the implementation of its time reporting systems. The second adjustment reduced the percentage of Ameritech's wiring expenses that the 1989 data classified as regulated by 9.8 percent to compensate for incorrect time reporting instructions for NA, NTF, travel, and testing time as well as for continuing problems in the implementation of Ameritech's time reporting systems.[19]

25. We believe that we should treat SWB in the same way we treated Ameritech. However, unlike Ameritech, SWB used time reporting results for 1988 as the starting point for its calculations. This 1988 data is likely to be less accurate than the 1989 data Ameritech supplied.[20] Therefore, we believe that SWB should receive a somewhat larger reduction than Ameritech in the percentage of wiring expenses that time reporting results classify as regulated. Under the circumstances, we find that adjustments reducing SWB's regulated percentage for Account 6362 by 12.9 percent will produce a regulated wiring allowance for SWB that closely approximates the results that proper time reporting practices would have produced. We accordingly allow SWB to include 52 percent of its expenses in Account 6362 in its interstate revenue requirement calculations. This will increase SWB's interstate revenue requirement allowance for regulated wiring by approximately $7.3 million.[21]

26. In the *1989 Review Order*, we relied on Section 204(b) of the Act, 47 U.S.C. § 204(b), to allow part of proposed rate revisions to go into effect, noting that "Section 204(b) provides the most appropriate remedy for rates that have been justified in part."[22] We noted that the tariff filing and petition cycle satisfied the Section 204(b) procedural requirements of the opportunity for written comment, and stated that "we believe it is preferable to calculate adjustments appropriate to correct apparent errors in LECs' rates wherever these are identifiable and allow the remainder of the rate to become effective."[23] As we noted above, it is our determination that some increase in SWB's allowance for regulated wiring is warranted. Accordingly, we authorize part of SWB's rate

increase based upon SWB's claimed proposed regulated wiring rate adjustment to become effective pursuant to Section 204(b).

**B. *Special Access Revenue Shortfall***

27. In the *Strategic Pricing Order*, the Commission adopted a range of reasonableness for high capacity special access rates which allowed LECs to set DS1 and voice grade service rates based upon crossover ratios between 4 to 1 and 8 to 1.[24] Notwithstanding this Commission requirement, SWB filed DS1 rates set at 8.7 times the voice grade rate. Accordingly, in the *1989 Access Order*, this Bureau found SWB's DS1 and voice grade rate relationship to be unreasonable, in violation of Commission requirements, and unjustified by SWB. We therefore stated that a rate adjustment factor (RAF) would be applied to SWB's DS1 rates to effect a partial allowance of that portion of the proposed DS1 rate SWB justified.[25]

28. In the *1989 Review Order*, the Bureau determined that to the extent LECs challenging the findings of the *1989 Access Order* relied upon corrections of erroneous data originally submitted or piecemeal new data submitted in place of original data, those LECs had not established a basis for the Section 61.38[26] waivers granted by the Tariff Division. Accordingly, we rescinded those waivers.[27] SWB's adjustment to its special access rates is akin to these two categories.

29. The present filing does not make a comprehensive showing of other adjustments to SWB's rates which may offset the rate relief requested on a piecemeal basis, such as a showing of the overall rate of return earned in the special access category. In the absence of such a comprehensive showing, we cannot accept SWB's increased special access tariff rates. The rate increases must be rejected for failure to meet the Commission's cost support requirements.

## V. FILING INSTRUCTIONS

30. In order to insure accuracy and timely review of the access rate revisions allowed by this Order, revisions to special access rates should be implemented as a rate adjustment factor (RAF) to recurring special access rates, excluding Individual Case Basis (ICB) rates and the special access surcharge rate. All revisions to the common line element should be made exclusively to the terminating CCL rate, except as noted above. Allocations of partial allowances among special access and common line must reflect cost allocation requirements contained in Part 69 of the Rules.

31. In its support materials, SWB should demonstrate that the annualized incremental revenues caused by the revised rates do not exceed the partial allowances permitted by this Order and that the revised rates accurately allocate the partial allowances among the Part 69 rate elements. As cost support to be included in the transmittals which implement these rate revisions, tables should be provided which demonstrate the accuracy of the RAF calculation by displaying for special access revisions: (1) the special access RAF; (2) revenues for the special access element calculated as a product of demand estimates filed for the 1989 annual access tariffs, and rates which are currently effective; and (3) the product of the RAF and the revenues such that the product equals the partial allowance permitted, plus the revenues in (2), above. For common line revisions, the accuracy of the proposed change should be demonstrated by the following display: (1) the currently effective terminating CCL rate; (2) the revised terminating CCL rate; (3) the difference between the CCL rates; and (4) the product of the difference multiplied by demand estimates, as revised in the *1989 Access Order*, such that the product equals the partial allowance.

## VI. CONCLUSION; ORDERING CLAUSES

32. We wish to emphasize that the partial rate allowance in this Order is not a rate prescription pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). Its represents, rather, a partial authorization of rates to the extent necessary to correct erroneous aspects of the rate development process as set out in the Southwestern Bell Telephone Company tariff filing and subsequent material of record.

33. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), that each of the rate changes proposed by Southwestern Bell Telephone Company which are not accepted or authorized in part by our actions in this Order ARE REJECTED.

34. IT IS FURTHER ORDERED that the special permission previously granting the Southwestern Bell Telephone Company waiver of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, for the purpose of proposing tariff revisions to special access rates IS RESCINDED.

35. IT IS FURTHER ORDERED that, pursuant to Section 204(b) of the Communications Act, 47 U.S.C. § 204(b), the rates for Southwestern Bell Telephone Company which are accepted in part in this Order ARE ALLOWED IN PART. Southwestern Bell Telephone Company is ordered to issue supplements in compliance with this Order, reflecting reductions and employing Rate Adjustment Factors, no later than October 19, 1989, with a scheduled effective date of October 23, 1989. Subsequent to such scheduled effective date, Southwestern Bell Telephone Company may file revised rates directly reflecting these partial authorizations and replacing rates based on Rate Adjustment Factors, to be effective on statutory notice.

36. IT IS FURTHER ORDERED that Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, ARE WAIVED for the purpose of compliance with this Order and Special Permission No. 89-717 IS ASSIGNED.

37. IT IS FURTHER ORDERED that the petition of MCI Communications Corporation to suspend and investigate the tariff filing IS GRANTED to the extent indicated herein, but IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

## FOOTNOTES

[1] Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 3638 (Com.Car.Bur. 1989) (*1989 Access Order*).

[2] Local Exchange Carrier Access Tariff Rate Levels, Memorandum Opinion and Order, 4 FCC Rcd 5533 (Com.Car.Bur. 1989) (*1989 Review Order*).

[3] SWB Description and Justification (D&J) at 1. The difference between the partial allowance and the amount claimed by SWB is due to SWB's implementation of certain cost manual revisions in response to earlier Bureau findings. *See* SWB D&J at 14-17; SWB Reply at 4.

[4] Citing Southwestern Bell Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, Memorandum Opinion and Order, 3 FCC Rcd 447 (Com.Car.Bur. 1988).

[5] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, FCC 88-321, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*).

[6] Citing *1989 Access Order*, 4 FCC Rcd at 3646.

[7] We determined in the *1989 Access Order* that the results of an audit of BellSouth's implementation of an approved cost manual set a reasonable benchmark to estimate allocations to regulated activities for the LECs. Our review of that audit and BellSouth's procedures led the Bureau to determine that 32 percent was the best available estimate of the proper allocation of inside wiring expenses to regulated activities. *Id.*

[8] *1989 Access Order*, 4 FCC Rcd at 3646.

[9] *Id.* at 3644-46.

[10] *Id.* at 3646-47.

[11] *Id.* at 3647.

[12] SWB D&J at 9-14.

[13] *1989 Access Order*, 4 FCC Rcd at 3644.

[14] Southwestern Bell Telephone Company Accounting Handbook, § V27.402 at paras. 5.01 & 5.06.

[15] *Id.* at para. 5.06.

[16] A technician whose first productive function at a customer premises is the installation of a network interface could apply either of these instructions if he traveled to the customer premises to install inside wiring.

[17] *Compare 1989 Review Order*, 4 FCC Rcd at 5539 (time reporting results adjusted where studies failed to confirm reliability of carrier time reporting practices).

[18] SWB incurs NA and NTF costs only during maintenance calls, and these costs are attributable to both regulated and nonregulated activities. Maintenance calls, in turn, generate less than half of the total expenses SWB records in Account 6362. *See* SWB Transmittal, Exhibit 3 at 1. Since NA and NTF calls constitute less than 15 percent of all SWB maintenance calls, even the application of the 32 percent factor to SWB's NA and NTF costs would not produce an adjustment exceeding 5 percent of the costs SWB forecasts for Account 6362.

[19] *See id.* at 5536.

[20] Since Tier 1 carriers did not implement their Part 32 cost manuals until January 1, 1988, we would expect improvement during 1988 in the implementation of the time reporting changes required by those manuals.

[21] We note that our treatment of SWB is consistent with our decision in the *1989 Review Order* to allow NET and NYT to classify as regulated 52 percent and 56 percent of their forecast regulated wiring expenses, respectively. *See id.* at 5538-39.

[22] Id. at 5551. We noted that we had relied on Section 204(b) in past annual access tariff filings. Id.

[23] *Id.*

[24] *Strategic Pricing Order*, 4 FCC Rcd at 4805.

[25] 1989 *Access Order*, 4 FCC Rcd at 3693-94.

[26] Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.

[27]28 *See 1989 Review Order*, 4 FCC Rcd at 5534, 5551.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-136**

In the Matter of

| | |
|---|---|
| Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2 | Transmittal Nos. 353, 355, AND 356 |
| Cincinnati Bell Telephone Company Revisions to Tariff F.C.C. No. 35 | Transmittal Nos. 517 and 537 |
| Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68 | Transmittal No. 1842 |
| United Telephone System Revisions to Tariff F.C.C. No. 5 | Transmittal No. 238 |

**ORDER**

**Adopted: September 13, 1989;Released: September 14, 1989**

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff transmittals, filed between March 6, 1989, and September 11, 1989, by various local exchange carriers (LECs), contain tariff revisions to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings. Transmittal Nos. 517 and 537, filed by Cincinnati Bell Telephone Company, contain ICB rates that conform to the rate structure of its pending generic DS3 tariff. The transmittals filed by the Ameritech Operating Companies and Southwestern Bell Telephone Company describe ICB arrangements outside the scope of their general tariffs for DS3 services. United Telephone System's transmittal would establish an ICB rate to provide DS3 service to a single customer. The captioned revisions are scheduled to become effective on dates ranging from September 15, 1989, to October 6, 1989. None of the revisions is opposed.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[1] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Ameritech Operating Companies, Tariff F.C.C. No. 5, Transmittal Nos. 353, 355, and 356, Cincinnati Bell Telephone Company, Tariff F.C.C. No. 35, Transmittal Nos. 517 and 537, Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1842, and United Telephone System, Tariff F.C.C. No. 5, Transmittal No. 238, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-693.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] Local Exchange Carriers' Individual Case Basis DS3 Sevice Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 85-216**

In re Applications of

| | |
|---|---|
| MARLIN BROADCASTING OF CENTRAL FLORIDA, INC. | File No. BPCT-850319KF |
| SUNSHINE TELEVISION 27, INC. | File No. BPCT-850320KN |
| REECE ASSOCIATES, LIMITED | File No. BPCT-850320KR |
| MAGIC CITY BROADCASTING, INC. | File No. BPCT-850320KU |
| ORLANDO 27, INC. | File No. BPCT-850320KX |
| HIGHLAND COMMUNICATIONS, LTD. | File No. BPCT-850320LA |
| CENTRAL FLORIDA TELEVISION, LTD. | File No. BPCT-850320LD |
| FLORIDA TELEVISION COMPANY | File No. BPCT-850320LM |

For Construction Permit
for a New Television Station
Orlando, Florida

**Appearances**

*Martin E. Firestone*, on behalf of Marlin Broadcasting of Central Florida, Inc.; *Robert Lewis Thompson*, on behalf of Sunshine Television 27, Inc; *Michael H. Rosenbloom* and *Rebecca L. Dorch*, on behalf of Reece Associates, Limited; *Paul A. Zevnik* and *Michael Y. Horton*, on behalf of Magic City Broadcasting, Inc.; *Christopher D. Imlay*, on behalf of Orlando 27, Inc.; *Lewis I. Cohen* and *Roy W. Boyce*, on behalf of Highland Communications, Ltd; *William H. Crispin*, *Dean R. Brenner*, and *Susan F. Heck*, on behalf of Central Florida Televisión, Ltd.; and *Roy F. Perkins, Jr.*, on behalf of Florida Television Company.

**DECISION**

**Adopted: September 29, 1989; Released: November 13, 1989**

By the Review Board : MARINO (CHAIRMAN), BLUMENTHAL, ESBENSEN.

Board Member BLUMENTHAL:

1. This is a comparative broadcast proceeding to select (from among twenty-one original mutually exclusive applicants) one of the eight remaining applicants [1] as the best qualified to receive a Construction Permit to establish a new UHF television station (Channel 27) at Orlando, Florida. *See Hearing Designation Order* (*HDO*), 50 Fed. Reg. 31030, published July 19, 1985. In an *Initial Decision* (*I. D.*), 3 FCC Rcd 4699 (1988), presiding Administrative Law Judge John M. Frysiak (ALJ) granted the application of Reece Associates, Limited (Reece), finding it comparatively superior to the other remaining applicants: Marlin Broadcasting of Central Florida, Inc. (Marlin); Sunshine Television 27, Inc. (Sunshine); Magic City Broadcasting, Inc. (Magic City); Orlando 27, Inc. (Orlando 27); Highland Communications, Ltd. (Highland); Central Florida Television, Ltd. (Central Florida); and Florida Television Company (Florida TV). In reaching his ultimate conclusion in favor of Reece, the ALJ first resolved the financial qualifications (and related mispresentation issues) he had earlier specified against Marlin (*Memorandum Opinion and Order*, FCC 86M-1787, released May 28, 1986), and against Sunshine (*Memorandum Opinion and Order*, FCC 87M-539, released March 16, 1987). He later ruled in favor of each applicant on the misrepresentation issues, but adversely to each on the underlying financial issues. [2] Next, under the standard comparative issue, the ALJ found that Reece: (1) suffered no media diversification demerit; (2) received a full 100% credit for integration of controlling ownership into active station management; (3) received qualitative enhancement for local residence, civic participation, minority ownership, and broadcast experience (plus a 95% female preference bonus); and (4) received a slight comparative coverage preference. Reece therefore edged out Central Florida, its closest rival. *See I. D.*, para. 397.

2. The proceeding is now before the Board on exceptions filed by each of the remaining applicants who were unsuccessful before the ALJ. Having reviewed the *I. D.* in light of the exceptions and reply briefs, [3] the oral argument held August 4, 1989, and our own independent examination of the record, we adopt the *I. D.* 's findings of fact and conclusions of law, except as modified herein, and affirm the grant of the Reece application.

**EXCEPTIONS**

*Financial Qualifications Issues*

3. *Marlin*. The ALJ added an issue to "determine whether Marlin is financially qualified to be a Commission licensee," based upon the deposition testimony of its principal (and financial vice president) Paula Stuart. When questioned about her role in Marlin's original financial certification, Stuart responded that although she had obtained oral assurances of financing from lending institutions, she "ha[d] not obtained a financial document which would commit us at this point." *Memorandum Opinion*

*and Order*, FCC 86M-1787, *supra*. Finding that Marlin did not have in hand documentation that would constitute "reasonable assurance that adequate financing can be secured" at the time it certified its application, the ALJ concluded that the addition of a basic financial qualification issue against Marlin, as well as a false financial certification/misrepresentation issue, was necessary. *Id.* (citing *Dutchess Communications Corp.*, 101 FCC 2d 243, 248-249 n.11 (Rev. Bd. 1985)). [4] After reviewing the evidence on these interrelated issues, the *I. D.* reports:

> After the instant financial issue against Marlin was added, [Marlin principals] Stuart and Surles solicited a letter from Rust of Baldwin, Rust and Dizney, Inc. (Marlin Ex. 9C; Tr. 5974-75, 6006). The resulting August 15, 1986, letter from Baldwin, Rust and Dizney, Inc., a firm of corporate finance and investment bankers, set out their willingness to "underwrite a debt commitment" for approximately $5 million for the purpose of funding a portion of the Marlin venture, with an amortized seven year repayment at either a variable rate floating or fixed rate interest, subject to a security interest in all the station's assets, execution and delivery of "certain documents acceptable to Baldwin, Rust and Dizney, Inc. providing terms and related conditions," and review of Marlin's financial condition and debt service projections (Marlin Ex. 9C). Ms. Surles explained the language of the Rust letter as follows:
>
> It is a process by which there is an attempt to secure other sources of funding for the loan. In the event that those other sources are not viable or forthcoming, then the primary individual mentioned here would underwrite or be responsible for and hold a liability (Tr. 6047).

*I. D.* at para. 20. However, the ALJ found that August 15, 1986 letter inadequate to establish Marlin's basic financial qualifications, opining that (*id.*, at para. 331):

> This letter expresses willingness on the part of the firm to underwrite a debt commitment to Marlin in the amount of $5 million. However, Marlin has not established that the firm of Baldwin, Rust and Dizney is a financial institution. Marlin's president believes that the firm will act as a broker arranging loans from other sources subject to a contingent obligation to provide funds itself to the extent it is unable to arrange loans. It does not appear that the primary business of the Baldwin, Rust and Dizney firm is to directly make loans and invest funds, and, therefore, it cannot be deemed a financial institution. Since it cannot be said that the firm is a financial institution, then proof of its financial capability to undertake the $5 million loan commitment is necessary. Commission policy is that evidence of financial capability be in the form of balance sheets or financial statements. *See* Form 301 (1980 ed.). No such evidence has been submitted. It must be concluded that the commitment letter of Baldwin, Rust and Dizney does not demonstrate that Marlin has the reasonable assurance of the availability of sufficient funds to construct and initially operate the proposed station. It follows that the financial issue specified against Marlin is resolved against its favor.

4. Marlin's exceptions claim that the record does not support the ALJ's conclusion that Baldwin, Rust and Dizney, Inc. (BRD) was not a recognized "financial institution," as intended by the Commission, and that the ALJ had made two prior rulings that were facially inconsistent with his final ruling. First, the ALJ had earlier ruled that Marlin need not produce for cross-examination the signator of BRD's commitment letter, Lee Rust, *see Order*, FCC 86M-3654, released December 18, 1986; *see also* Tr. 6024, despite Highland's contention at the hearing that "there is uncertainty on the face of the letter as to whether Mr. Rust's firm is a 'financial institution' within the meaning of [FCC Form] 301." Tr. 3222; *see also id.*, at 3219-3226, 4384. That initial ruling, Marlin submits, was consistent with long-standing Commission precedent that "an applicant need not produce as a witness the author of a commitment letter from a 'recognized financial institution'. Marlin Br. at 12 (citing *Great Lakes Television, Inc.*, 25 FCC 470, 511 n.20 (1958)). Second, and subsequently, the ALJ admitted the BRD letter into evidence, again over Highland's objection that Marlin had failed to show that BRD was a "recognized financial institution," or that BRD was initially able to fund the $5 million commitment by itself. Tr. 6021-6024. Marlin asserts that the BRD letter was here again sufficient to certify its financial qualifications, and that, at minimum, it lacked notice that any further evidentiary showing would be required in view of the two earlier ALJ rulings against Highland described above. We are constrained to agree with Marlin's latter contention.

5. Without reaching the dual questions of whether BRD is a "recognized financial institution" within the Commission's purport, *compare WBOK, Inc.*, 17 FCC 2d 844, 845 (1969) (financial qualification based largely on underwriting of public stock offering of applicant there sufficient) *with id.*, at 848-49 (dissent), [5] or whether BRD could have actually provided the $5 million to Marlin, we believe that the ALJ's earlier evidentiary rulings deprived Marlin of a full opportunity to make its case on behalf of BRD at the hearing below. Moreover, because we are aware of no direct case precedent, nor has any been cited to us, answering definitively the question of just what is a "recognized financial institution" for FCC purposes, Marlin might have been allowed to amend its application to specify an alternative source of funds, had not the ALJ twice previously appeared to accept the BRD commitment as sufficient. As it is, and did not Reece prevail over Marlin under the standard comparative issue, albeit narrowly, we would be compelled to remand this proceeding to determine whether the BRD commitment was, in fact, supported by substance, and hence whether Marlin ever possessed a good faith basis for relying on BRD in the first instance.

6. *Sunshine*. In his *Memorandum Opinion and Order*, FCC 87M-539, *supra*, the ALJ also added a false financial certification issue against Sunshine, after its principal, Michela English, testified that she had certified its application based principally upon a discussion that her husband (and another Sunshine stockholder) had with an employee of Sun Bank. That employee, Mercedes McCall, was a close personal friend of that other Sunshine stockholder, Donald Quartel. But, English concedes that she had had no commitment letter or other documentation from Sun Bank at the time she certified the Sunshine application. Rather, reliance is placed on a letter of May 1, 1987, signed by McCall, stating in pertinent part:

> Our Bank has been involved in this type of project in the past and, based on our experience, your loan request of $5,000,000.00 (five million dollars) with a repayment term of seven years, is one which falls within our guidelines. The rate of interest will be determined at time of approval. The loan would be conditioned on the grant by the FCC of a construction permit to Sunshine and the execution of all appropriate documentation.

By means of this letter, we are requesting that you forward to our office a copy of your application to the FCC along with the appropriate pro formas and financial statements.

*I. D.* at para. 31. However, Sunshine's principals never supplied the financial statements (and other documentation) demanded by the bank, so that it might more seriously consider a potential future loan to Sunshine. *Id.*, para 334.

7. Nonetheless, Sunshine argues that "the alleged deficiences in the bank letter relied on by the [ALJ] do not support his conclusion" because: (1) three of Sunshine's nine shareholders are Sun Bank clients, and therefore the "evidence plainly establishes that the Sun Bank of Orlando made a full and complete evaluation of Sunshine and its principals" at a later time, Sunshine Br. at 3-4; (2) English thought that Sun Bank wanted the "pro formas and financial statements" only *after* grant of Sunshine's FCC application, *id.* at 4-5; and (3) the bank letter language "your loan request . . . falls within our guidelines" was more than a mere accommodation or a perfunctory invitation to a regular loan application. *Id.* at 5-6.

8. We deny Sunshine's exceptions. The legal standard to be applied here is "reasonable assurance" of fund availability. *Dutchess Communications Corp.*, 101 FCC 2d 243, 246 (Rev. Bd. 1985) (citing *Jay Sadow*, 39 FCC 2d 808, 810 (Rev. Bd. 1973)). The applicant must show that it is willing, *and able*, to meet all of the lender's requirements with respect to collateral, guarantees, and capital investment by the lendee. Not only did Sun Bank's May 1, 1987 letter fail to offer a loan, it failed to identify any interest rate, collateral, or guarantee requirements. Indeed, its letter did not even coincide with the draft furnished to it by Sunshine counsel, which would have had Sun Bank unequivocally declare:

> This letter is intended to provide you with reasonable assurance that this Bank is able and willing to loan Sunshine . . . up to $5,000,000.

Reece Exh. 49. Counsel's draft also suggested precise interest and repayment terms (but only vaguely subjected the proposed loan to "the Bank's normal collateral requirements.") As is plain from the letter actually provided to Sunshine, the bank was willing only to invite a formal application, accompanied by the ordinary supporting financial statements from the principals. Sunshine never supplied these critical documents to the bank, so the bank, quite naturally, could not respond with "reasonable assurance" in the absence of the vital loan data from the Sunshine principals. *See Dutchess Communications, supra*, 101 FCC 2d at 244-249. *Compare also Chapman Radio & Television Co.*, 70 FCC 2d 2063, 2072 (1979) (omission of collateral requirement vitiates reasonable assurance of a loan) *with Multi - State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978). In *Multi -State*, the court did find that specific collateral requirements were not critical, where that particular bank letter expressed a specific willingness to make a loan, provided a specific interest rate and repayment provisions, and indicated that the bank was "personally and favorably acquainted with several of the [applicant's] stockholders." *Id.*, at 118. None of these saving factors is present here, and we find that Sun Bank's letter was clearly no more than a routine invitation to apply for a potential loan; it gives absolutely no assurance of the positive reception of any such application, "reasonable" or otherwise.

9. In concluding that Sunshine is financially unqualified, we have also decided that unlike the unusual circumstances facing Marlin, no equities would favor permitting Sunshine some further opportunity to supplement its deficient financial showing. Unlike Marlin, Sunshine has had a full and fair opportunity to litigate its financial issue. All it has demonstrated is that nothing palpable supported its financial certification; only some preliminary discussion between two potential loan customers and a friend at a bank. Were we to accept Sunshine's position here, we would reduce the Commission's "reasonable assurance" standard to a nullity. Certainly banks have money to lend, but a loan *commitment* requires more than the claim that loan money is available at banks to acceptable borrowers. "Reasonable assurance" means that the applicant has passed initial muster for a loan, and that unless circumstances have changed, a loan is almost certainly forthcoming. *Dutchess Communications*, 101 FCC 2d at 246 n.4. Indeed, the Sun Bank letter bandied by Sunshine is greatly less reassuring than the bank letters questioned by the Commission in *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), where it was observed:

> Although the bank letters relied upon by the applicants meet the reasonable assurance standard and the various banks have asserted that they were issued on good faith, it is clear that the applicants' individual qualifications were not considered by those banks. Inquiry is needed to determine whether the bank letters were more than accommodations and were issued consistent with normal banking practices.

*Accord, JAM Communications, Inc.*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989). Not only does Sun Bank's letter make clear that "the applicants' individual qualifications" had not yet been reviewed, it provides no assurance whatsoever of a commitment. *Compare, e. g.*, the *Christina* bank letters, above.

10. On the companion false financial certification issue, the ALJ held that while "Sunshine principals lacked diligence in handling the matter of Sunshine's financial qualification . . . it is not warranted to say that in certifying its financial qualifications Sunshine intended to deceive the Commission." *I. D.*, at para. 333. Sunshine claims that its principals, English and Quartel, were under the impression, perhaps erroneous, that preliminary oral discussions with a bank were a sufficient basis upon which to certify Sunshine's application. While this is a close question, we need not decide the misrepresentation issue here, since we affirm the ALJ's conclusion that Sunshine failed utterly under the basic financial qualifica-

tion issue designated against it. But, we must say that for Sunshine's very sophisticated principals to have certified as to "reasonable assurance" of a $5 million bank loan, under the very dubious circumstances here present, suggests a rather slippery approach to the Commission's bedrock financial requirements. We affirm Sunshine's financial disqualification, but need not pursue further the question of any intent to deceive.

## STANDARD COMPARATIVE ISSUE

11. *Reece Associates*. Selected by the ALJ as the superior applicant, Reece has drawn heavy fire from nearly all of the exceptors, most of whose complaints centering around the ALJ's award of 100% quantitative "integration credit to Reece. In addition to urging the drastic diminution (or total vitiation) of Reece's "integration" credit, at least one antagonist contends that the ALJ erred in failing to consider Reece's "B" cut-off organizational maneuvers as tantamount to misrepresentation. [6] The sequence of events leading to these exceptions is detailed in paras. 171-180 of the *I. D.*, which details we outline below.

12. When it originally filed on March 20, 1985, Reece Associates was depicted as a simple husband/wife-owned corporation, with Marsha Reece holding 51%, and her husband, Rudolph, owning 49%. On the "B" cut-off date, May 6, 1985 (the deadline for amendments as a matter of right, 47 CFR § 73.3522(a)(2)), the Reeces refiled as a "limited partnership" rather than a corporation. In its amended form, the Reece Associates "limited partnership was now constituted, in part, as follows:

*General Partners*
Marsha Reece 1% equity
RA Communications, Inc. 24% equity
(RAC)
*TOTAL* 25% equity

In turn, RAC, the 24% corporate "general partner," was portrayed as 95% owned by Marsha Reece, with the remaining 5% of the RAC shares now held by her husband. The new "limited partners" of the reformed Reece Associates, holding 75% of its total equity, were two irrevocable trusts, the Lori Beth Herpe Sinns Trust and the Debra Gail Herpe Schwartz Trust. One other important change attended the Reece's "B" cut-off date amendment: whereas their original application had candidly stipulated that the Reeces were not yet financially qualified, their amendment now indicated in the affirmative, as a result of the fresh financial commitments of the Sinns and Schwartz Trusts to participate as 75% "limited partners." However, because the final ownership contract between the Reeces and the two Trusts had not been legally consummated by the "B" cut-off date (*i. e.*, May 6, 1985), Mr. Reece "stood-in for several weeks as the surrogate "limited partner" under Florida law, until the final ownership contract with the two Trusts was formally executed on August 1, 1985. *See I. D.*, paras. 179-180. [7]

13. The exceptions challenge Reece's "B" cut-off reorganization on several fronts, starting with the claim that to the extent that Mr. Reece, for the period between May 6 and August 1, 1985, may have occupied simultaneously the position of both a "limited" partner (as nominal surrogate for the Trusts) and that of a "general" partner (through his RAC equity), his two positions were fundamentally incompatible under the Board's holding in *Cotton Broadcasting Co.*, 104 FCC 2d 473, 475-477 (Rev. Bd. 1986). However, assuming *arguendo* that Mr. Reece did nominally occupy dual partnership roles for that fleeting interstice, the Commission's recent reversal of *Cotton*, 4 FCC Rcd 1781 (1989), and its approval of arrangements whereby an applicant principal concurrently holds both "general" and "limited" partnership shares, eliminates the grounds for this exception. *See also Newton Television Ltd.*, 4 FCC Rcd 2561 (1989) (reaffirming its holding in *Cotton)*.

14. Moreover, and again assuming that Mr. Reece was to be considered a "limited" partner (albeit a temporary stand-in for the Trusts), the later substitution of the two Trusts as the 75% "limited" partner was permissible under the Commission's ruling in *Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981), where the post "B" cut-off transfer of a 71% equity share in an applicant to a "limited" partner that was not part of the original application was found not to have affected the applicant's basic or comparative standing. The *Anax* Commission reasoned that, since "limited" partners are mere "passive investors" who exert no managerial control over a licensee's affairs, the later addition or substitution of such passive investors is not cognizable in the slightest for comparative purposes. But, say the exceptors, the *Anax* presumption is inapposite here, because it cannot be argued that Mr. Reece was (and is) merely a "passive investor," and that his temporary placement of himself in the shoes of the "limited partner" Trusts was a misrepresentation of Mr. Reece as "passive" that must, at minimum, nullify Reece's ownership "integration" claims.

15. We find that the Commission's decision in *Cotton*, finding no inherent conflict in a dual "limited"/"general" partnership role, undercuts the exceptors' argument that Mr. Reece's temporary occupation of the Trusts' position as the "limited" partner (even assuming Reece actually did so for FCC purposes) precludes the claim that Rudolph Reece misrepresented himself to this agency. It is true that Reece's "B" cut-off date amendment, reporting the addition of new 75% "limited" partners, did advise the FCC as follows [8]:

### LIMITED PARTNERS

Seventy-five percent of the interest of the applicant limited partnership is or will be held by limited partners. The applicant certifies that its Agreement of Limited Partnership conforms in all respects with the Uniform Limited Partnership Act and that none of the limited partners are or will be involved in any material respect in the business or operation of the station. Further, the applicant certifies that none of the limited partners have media interests subject to the Commission's cross- interest policy with respect to attributable media interests.

It is also accurate that, for purposes of registering in the State of Florida, Rudolph Reece was briefly listed as Reece Associates' 75% "limited partner, pending finalization of the ownership contract with the two Trusts. However, even Reece's most vociferous challengers do not assert that the Reeces did not have a solid agreement with the two Trusts on the "B" cut-off date sufficient to regard the Trusts as the "limited" partners noted in the FCC amendment. *See* , *e. g.*, Central Florida Exceptions at 12 ("[p]rior to the "B cut-off date, the Reeces reached a

binding agreement . . . whereby [the Trusts] would become limited partners"). But, as Reece explains, the preparation and finalization of the ownership documents took longer than anticipated to accomplish, so that upon advice of counsel "it was decided that [Mr.] Reece would stand-in, in a strictly nominal status, as a limited partner for the short time it takes for the trust formation documents to be completed," in view of the fact "that Florida law required a limited partner to be named in order to effectuate the filing . . . ." Reece Reply at 5.

16. It is, of course, this listing of Rudolph Reece as the Reece Associates' "limited partner" on their state registration documents, even if only for the few weeks following Reece's "B" cut-off FCC filing, that has created this entire ruckus. Having reviewed all of the attendant circumstances, we find that the ALJ was correct in resolving that no misrepresentation issue was warranted. It has been long held that, unless there is identified a motive to deceive, a misrepresentation issue is generally unjustified. *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1176-1177 (Rev. Bd. 1981). Here, it is not seriously maintained that Reece sought to *conceal* its "limited" partnership agreement with the Trusts in its "B" cut-off amendment; indeed, given that Reece's vital deadline claim to basic financial enqualification was based squarely on its fresh agreement with the Trusts, no motive to conceal is remotely conceivable. Nor did Reece's "B" cut-off date filing with the FCC conceal the addition of the new 75% "limited" partners. In fact, as reprinted above, Reece's amendment loudly proclaimed the fact. [9] Whatever the advisability of the listing of Mr. Reece as the "stand-in" for the Trusts in its state registration documents, until its final ownership documents were executed, we find absolutely no intent on the part of Reece to deceive the FCC, or anyone else for that matter. Nor does anyone claim to have been deceived. The picture is complete, and contains no evidence of deception or intent to conceal Reece's "limited" partner from this agency or from Reece's several competitors.

17. Furthermore, the Commission has held that the failure on the part of an applicant to have finalized its organizational documents prior to the "B cut-off deadline does not affect either an applicant's basic legitimacy or its "integration" proposal. *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988). Although Reece's limited partnership agreement with the Trusts was not formally finalized at the "B" cut-off date, almost all parties to this case concede to the existence of an orally binding arrangement with the Trusts sufficient for FCC purposes at the "B" cut-off deadline; and Reece has not once departed from the ownership structure portrayed in its amendment, particularly insofar as the 75% equity interest of the two Trusts. On that score as well, we affirm the ALJ.

18. Where we agree with the exceptors, and where the record is at sharp odds with Reece, is the *I. D.* 's acceptance of the Reece deadline claim of a revised 95% 5% equity split between Mr. & Mrs. Reece, as opposed to the nearly equal (51%/49%) equity split depicted on Reece's original application. As the ALJ records:

> The Reeces have worked as husband and wife team from the time RAC was formed. Ms. Reece initially took the lead in the Reeces' efforts to organize and prepare an application, and both Marsha and Rudy Reece were actively involved in all aspects of preparation of the application. Marsha Reece obtained the rights for the original transmitter site, and both Marsha Reece and Rudy Reece were involved in obtaining the current transmitter site. Both Marsha Reece and Rudy Reece have communicated and corresponded with the consulting engineer. Pursuant to Ms. Reece's instruction and authorization, Mr. Reece obtained an equipment proposal from Harris Company and managed the corporate bills. Both Marsha and Rudy Reece have communicated with local counsel and communications counsel, and both were involved in the negotiation and preparation of the limited partnership agreement. Both Marsha and Rudy Reece are authorized to sign checks for the partnership.

*I. D.* at para. 178 (Tr. citations omitted). Moreover, while Mrs. Reece, who has extensive broadcast experience (*see id.*, paras. 191-192), will work fulltime at the station as director of news and public affairs (*id.*, para. 182), "Rudolph Reece will serve as station manager and business manager of the station . . . ." *Id.*, at para. 183. And, he "will have day-to-day authority to oversee recruitment, hiring and employee promotion practices of all departments of the station." *Id.* It is undisputed that Reece's deadline revision, *viz.*, "increasing Ms. Reece's share from 51 percent to 95 percent and decreasing Mr. Reece's share from 49% to 5%, was to attempt to make the Reece Associates appear stronger in comparison to the other applications in this proceeding." *Id.*, at para. 177. Reece's purpose, of course, was to elevate (by nearly 100%) its female equity component, a highly controversial but sometimes decisional comparative factor. *See , e. g., Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 651-653, *recon. denied*, 94 FCC 2d 72 (Rev. Bd. 1983), *review denied*, FCC 84-161, released April 13, 1984 (Comm'n), *remanded sub nom. Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated en banc*, No. 84-1176 (D.C. Cir. October 30, 1985), *reaffirmed*, 3 FCC Rcd 864 (1988) (Comm'n), *settlement approved*, 4 FCC Rcd 4700 (1989), *recon. dismissed*, FCC 89I-48, released August 8, 1989.

19. However, we thoroughly agree with the exceptors that the record demonstrates an essential parity of ownership interests and managerial responsibility as between the married Reeces, and does not support their ambitious claim to the new and grossly disproportionate equity interest of Mrs. Reece. This is not the first occasion that the Board has been called upon to review an eleventh-hour increase in a wife's purported equity interest, *see Chester Associates*, 2 FCC Rcd 2029 (Rev. Bd. 1987); but, based on this record, we must here conclude that the Reeces have, and will, comport themselves *as if* they were co-equal partners in the management of Reece Associates. For, "the crux of [the Commission's] integration calculus is the coincidence of legal responsibility for and actual participation in" station management. *Absolutely Great Radio, Inc.*, 104 FCC 2d 1, 5 (1986) (quoting *Ventura Broadcasting Co. v. FCC*, 765 F.2d 184, 190 (D.C. Cir. 1985)). By that formula, the record here confirms that the Reeces' respective ownership interests are *de facto*, 50%/50%, and their last minute claim to a 95% (female)/5% (male) equity apportionment is rejected as thoroughly bereft of objective validation. We shall regard the Reeces as no better, nor worse, than the two 50%/50% "general" partners.

20. *Reece's Comparative Coverage*. The ALJ credited Reece for the signal coverage of the areas and population it first proposed in a May 2, 1986 amendment to its application, because that proposal would not cause impermissible comparative upgrading, instead effecting a reduction in coverage from its proposal contained in an earlier amendment filed May 6, 1985 (the "B cut-off date in this proceeding). *See I. D.*, paras. 324-325; *Memorandum Opinion and Order*, FCC 86M-1792, released May 28, 1986. In its exceptions, Orlando 27 claims that Reece should have been credited with the still lesser coverage which would have been provided had Reece simply lowered the proposed antenna height on its 1985 proposal to comply with Federal Aviation Administration (FAA) objections, instead of proposing an entirely new site in 1986. Orlando Br. at 31-38. More specifically, Orlando 27 claims that Reece's May 2, 1986 petition for leave to amend was not accompanied by good cause and should have been denied because Reece's need to amend was "foreseeable," it lacked diligence in filing, its amendment was "voluntary", and also prejudiced the competing applicants. After reviewing the record, we find Orlando 27's exceptions to be without merit and affirm Reece's comparative coverage credit.

21. In its original application filed March 20, 1985, Reece proposed an antenna height of 1605.8 feet above average terrain, at a site located some 6 miles southeast of Clermont, Florida. Reece Application (FCC Form 301), Section V-G. Then, in its May 6, 1985 amendment, it proposed a new transmitter site near Clermont, some 1.8 miles east of Orange Mountain, and specified an antenna height of 1990 feet above average terrain. On July 15, 1985, Reece petitioned for leave to amend to report its receipt of an FAA "Acknowledgement of Notice of Proposed Construction and Alteration," issued June 14, 1985, which stated that Reece's amended proposal would exceed FAA obstruction standards, that a reduction in height from the proposed 1984 feet to 504 feet above ground level "would not affect any IFR Altitudes," but that Reece could request a further aeronautical study to determine whether its proposal would in actuality pose a hazard to air navigation. By letter of June 26, 1985, Reece's consulting engineer requested further aeronautical study by the FAA. Reece Petition for Leave to Amend, filed July 15, 1985, Attachments. The FAA responded by issuing, on August 8, 1985, an "Aeronautical Study of Proposed Construction and Alteration" which acknowledged that the FAA was then in the process of conducting the requested study, invited comments by interested persons, and more fully stated why its preliminary review had indicated Reece's proposal would exceed FAA obstruction standards. *See* Reece Amendment, filed September 10, 1985. Reece's unopposed amendments, filed July 15 and September 10, 1985, were granted by the ALJ. *Orders*, FCC 85M- 3404 and FCC 85M-3766, released August 30 and September 27, 1985, respectively. [10] At this point, Reece retained an aeronautical consulting engineer, Lowell Wright, to "facilitate and coordinate the FAA study." [11] Subsequently, on February 27, 1986, the FAA held an informal meeting with numerous applicants in this proceeding to discuss the FAA's findings with respect to their proposed antenna sites. *See* Orlando 27 Br. at 32; Reece Reply at 23. At that meeting, Walter H. Wulff of the FAA informed Reece that its proposal would not receive FAA approval, unless it lowered its proposed antenna height to 1,049 feet above mean sea level. *See* Orlando 27 Br. at 32-33. After consulting with its counsel and engineer, Reece decided that "its best opportunity to provide optimum service to the Orlando area without incurring any further [FAA] delay" would be to amend its antenna proposal to specify the transmitter site and antenna height proposed by competing applicant Orlando 27, which already had received FAA approval. [12] Reece immediately began negotiations with the owner of that site, Rufus L. Suggs, and obtained his agreement to use the site, on April 2, 1986. [13] Reece then began preparing an engineering amendment focused on that site; the amendment was subsequently filed on May 2, 1986. [14] Despite Orlando 27's opposition, the ALJ granted Reece's petition for leave to amend, and accepted the amendment, finding that it was accompanied by "good cause," and further finding that Reece's comparative coverage from the amended site should be fully credited because it effected a *reduction* in coverage from its previous proposal, and therefore would not result in any impermissible comparative upgrading. *Memorandum Opinion and Order*, FCC 86M-1792, released May 28, 1986 (citing *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986)).

22. We agree with the ALJ's resolution of this matter. The governing legal principle is that a post-designation engineering amendment may be approved only if it is "unforeseeable," pursuant to Section 73.3522(b)(1) of the Rules, 47 CFR § 73.3522(b)(1), and passes the following time-honored six- point test of "good cause": (1) it was filed with due diligence; (2) it was not required by the voluntary act of the applicant; (3) it would not necessitate any modification or addition of issues or parties; (4) it would not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) it would not unfairly prejudice the other parties; and (6) it would not give the applicant a competitive advantage. *Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

23. We believe that Reece acted with due diligence at all times. Thus, Reece acted promptly in notifying the FAA of its site proposals, responding to the FAA's adverse preliminary determination with a request for a more definitive aeronautical study, hiring an FAA specialist, negotiating with the FAA, keeping the Commission informed as to its status with the FAA, and in negotiating for a new site after being informed directly by the FAA in a meeting with the applicants in February 1986 that its proposal was unacceptable. This is the very essence of diligence. *See Priscilla L. Schwier*, 3 FCC Rcd 4355, 4357 (Rev. Bd. 1988); *Mary Ann S. Bohi*, 103 FCC 2d 1008, 1015 (Rev. Bd. 1986). Also, as in *Schwier*, the applicant's previous site would have received FAA approval, but only at a substantially lowered antenna height, and there is no record evidence that the applicant knew or should have known earlier that the FAA would disapprove of its proposal; therefore, the need to amend was both "unforeseeable" and "involuntary." 3 FCC Rcd at 4356. Neither unforeseeability, involuntariness, nor diligence are vitiated, as suggested by Orlando 27, by the applicant's choices to: (1) initially seek a full-scale FAA study rather than amend immediately to a new site; and (2) change sites rather than simply reduce antenna height at the existing site. This is so because both the Commission and the Board have long recognized that the choice to "fight or switch" is entirely up to the applicant, as long as it acts promptly and reasonably under the circumstances. *See Women's Broadcasting Coalition, supra*, 59 RR 2d at 732 (applicant negotiated agreement with FAA on original site, but then changed sites after FAA subsequently with-

drew its approval); *Cuban - American Limited*, 2 FCC Rcd 3264, 3265 (Rev. Bd. 1987) ("Commission precedent does not require an applicant to 'switch rather than fight' on its choice of a transmitter site"); *Horizon Broadcasting, Inc.*, 103 FCC 2d 656, 660 (Rev. Bd. 1986) (applicant has choice of switching to lower FAA-acceptable height, changing sites, or requesting further FAA aeronautical study; it is required only to elect some course of action and pursue that course diligently); *Neil I. Sanders*, 102 FCC 2d 865, 868 (Rev. Bd. 1985) (same). Further, because the competing applicants were put on notice by Reece's earlier "B" cut-off amendment proposing *greater* signal coverage, they cannot be said to have been unfairly prejudiced by the ALJ's acceptance of its actual, but somewhat *lower*, coverage proposed in its later amendment. Indeed, the site chosen by Reece -- that specified by Orlando 27 -- was known to the other applicants by the "B" cut- off date. Clearly, Reece did not upgrade its coverage proposal after the date when the comparative cases became fixed. *See Women's Broadcasting Coalition, supra*, 59 RR 2d at 733. Accordingly, we affirm the ALJ's determination that Reece's May 2, 1986 petition for leave to amend was accompanied by good cause and, under the circumstances present here, warranted full comparative recognition. [15]

24. *Marlin*. The ALJ found that Marlin is a corporation composed of seven equal stockholders, each currently owning 100 shares and representing 14.3% of Marlin's total equity. *I. D.*, para. 40. Each stockholder proposes "to relinquish all other full-time employment and to devote full-time, at least forty hours per week, to the management of the station." *Id.*, at para. 43. After reviewing in detail Marlin's ownership "integration" proposal, including each individual stockholder's qualitative attributes, *id.*, paras. 43-67, 338-340, the ALJ awarded Marlin 100% fulltime "integration" credit, enhanced moreover by local residence (100%), civic participation (100%), and female ownership (100%), plus a 42.85% bonus for minority ownership. No exceptions challenge these calculations, so they are effectively affirmed. *See* 47 CFR § 1.277(a) (any objection not saved by exception is waived).

25. Under the primary comparative factor of diversification of the mass media, the ALJ found that "[n]either Marlin nor any of its principals have any ownership interest in any medium of mass communications," *I. D.*, at para. 342. This despite the fact that 14.3% stockholder, Carol Surles, is a member of the Board of Trustees of WMFE public broadcasting, as well as a former member of the WMFE Public Television Advisory Board, and notwithstanding 14.3% stockholder Carolyn M. Fennell's present membership on that same Advisory Board. *Id.*, paras. 58-59, 65, 342. The ALJ reasoned that, since service as a public broadcasting trustee by a commercial broadcast station principal is not prohibited by a Commission rule or policy, such activity has no diversification impact. *Id.*, para. 342 (citing *Mid - Continent Broadcasting Co.*, 2 FCC Rcd 210, 212 (1987)). He further held that, as none of the trustees possess day-to-day operational involvement with WMFE, Surles' "role as trustee is too attenuated to be given any comparative weight," *id.* (citing *Minority Broadcasters of East St. Louis*, 99 FCC 2d 264 (Rev. Bd. 1984), *modified on other grounds*, 57 RR 2d 1390 (1985)), and that membership on the Advisory Board of WMFE is not a significant managerial position requiring media diversification consideration. *Id.* (citing *Las Americas Communications*, 1 FCC Rcd 786, 791-792 (Rev. Bd. 1986)).

26. In its exceptions, Sunshine demands that "Marlin should receive at least a slight demerit for the failure of Ms. Surles to timely pledge that she would resign from the board of trustees of WMFE-TV, Orlando." Sunshine Br. at 16 (citing *Guy S. Erway*, 48 FCC 2d 829 (Rev. Bd. 1980)). We deny Sunshine's exception. Commission and Board precedents are clear that, in situations such as the case at bar, mere membership on a board of trustees of a noncommercial broadcast station, with no participation in the actual management or operation of the noncommercial station, "is simply too remote and attenuated to be given weight as a comparative factor." *Minority Broadcasters of East St. Louis*, 99 FCC 2d at 272 (citing *Waters Broadcasting Corp.*, 88 FCC 2d 1204, 1207 (Rev. Bd. 1981), *aff'd in pertinent part*, 91 FCC 2d 1260, 1265 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984)). *Compare also San Joaquin TV Improvement Corp.*, 96 FCC 2d 594, 595-598 (Rev. Bd. 1983) (diversification demerit given where principals were "deeply enmeshed" in the operational broadcast activities of nearby non-commercial station, including positions as station manager and executive director).

27. *Magic City*. A corporation, Magic City set forth the following fulltime ownership/management "integration" proposal: 50% stockholder Fausto Sanchez, general manager of the station; 35% stockholder Ernesto Gonzalez-Chavez, programming and news director; 10% stockholder Anna Gonzalez, director of personnel and public affairs; and 5% stockholder Shirley Boykin, director of business affairs. *I. D.*, paras. 211-220. However, the ALJ awarded Mr. Gonzalez-Chavez only part-time "integration" credit, because his fulltime commitment:

> is irreconciliable with his intentions to maintain his interest in [his] architectural and construction businesses. Both of these ventures will require some daytime involvement. Mr. Gonzalez-Chavez may be credited only with part-time integration in the proposed station, 20 hours per week.

*Id.*, at para. 363. In describing this principal's fulltime commitment to his present business interests, the ALJ stated: "Mr. Gonzalez-Chavez works at least 40 hours per week . . . he leaves the house early in the morning and returns late at night". *Id.*, at para. 218.

28. Magic City complains that it should have been awarded 100% credit, since it adequately showed how Gonzalez-Chavez would curtail his architectural and construction enterprises, so as to devote at least 40 hours per week to the proposed station. However, we find this exception to be unpersuasive. Magic City does not dispute the ALJ's findings that its principal will not divest these businesses and that he currently works fulltime at them. It is the applicant's obligation to make a specific record showing of how it will accommodate its outside interests to its broadcast proposal. *See Stanly Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5020-5021 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952, *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988); *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988). This was not done adequately here. Moreover, even assuming *arguendo* that Magic City were to receive the quantitative credit it seeks, its application would yet be, by FCC comparative standards, qualitatively inferior to Reece. Whereas Reece is entitled to 100% local residence and civic participation

credits, Magic City would have only a 50% corresponding credit for the local residence and civic activities of Gonzalez, Boykin, and Gonzalez-Chavez (plus slight credit for Sanchez's proposed future local residence). Also, Reece is entitled to 50% female enhancement, compared to 15% (for Gonzalez and Boykin). Thus, and in any event, Magic City cannot prevail.

29. *Orlando 27.* Structured as a two-tier corporation, Orlando 27 has five Class A "voting" shareholders and eleven Class B "non-voting shareholders. Each shareholder has subscribed to 100 shares (or 6.25% of the equity) of the corporation. *I. D.*, paras. 237-239. It proposes that each "voting" shareholder devote fulltime to station management. *Id.*, paras. 250- 253, 367. However, the ALJ found that the "voting" shareholders of Orlando 27 have allowed "non-voting" shareholders to participate in corporate decision- making to a considerable extent, thereby creating the presumption that its "non-voting" shareholders would continue to participate in station management. *Id.*, para 367. Indeed, he observed that Orlando 27 "has the earmarks of being a joint venture," because the shareholders ignored the restrictions in the corporate "buy-sell" agreement, and permitted a Class A "voting" shareholder to transfer entirely his ownership interest to Class B "non-voting" stock. *Id.*, para. 369. And, the ALJ found that the "separation of the voting shareholders from the influence of the non-voting shareholders in . . . management . . . is further compromised by the terms of the Stock and Loan Subscription Agreement," which provides that any failure of a "voting shareholder to meet its financial obligation to Orlando 27 empowers any "non- voting" stockholder to pay the unpaid amount, and that "the money paid will be deemed a loan to the voting shareholder secured by the voting shareholder's stock." *Id.*, at para. 370. Further, because the "buy-sell" agreement restricts "voting" shareholders from selling or transferring their shares for five years, the ALJ found them "financially beholden to the non- voting shareholder [and] complaisant to the management suggestions of the non-voting shareholder." *Id.* He concluded (*id.*, at para. 371):

> All of the foregoing indicates that Orlando 27 is in reality a one tier corporation, all of whose shareholders have participated in corporate affairs and management, a fact which serves as extrinsic evidence that they will continue to act in like fashion. *Victory Media, Inc.*, [3 FCC Rcd 2073 (1988)]. Therefore, the maximum quantitative integration credit which can be awarded to Orlando 27 is that amount of ownership attributable to the principals proposed to be integrated. *See Coast TV*, [2 FCC Rcd 2982 (Rev. Bd. 1987)]. Since only five of the 16 principals are proposed to be integrated, Orlando 27 can be awarded a maximum 31.25 percent full-time quantitative credit.

30. Orlando 27 here reasserts its claim for 100% quantitative "integration" credit, arguing that: (1) its "voting and non-voting stockholders have been isolated" since its formal incorporation; (2) although "participat[ing] in the discussion" of a few of the agenda items at the April 24, 1985 Board of Directors meeting, its non-voting shareholders "did not in any way participate in the vote on *any* of the items"; (3) the ALJ incorrectly held that a non-voting shareholder negotiated the fee arrangement with its engineering consultant; and (4) whereas its non-voting stockholders were active prior to incorporation, only the voting stockholders have been active in corporate management thereafter.

31. The Commission just recently explained:

> In assessing integration proposals, we do not generally consider the ownership interests of "passive" investors, such as non-voting shareholders or limited partners. *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074-75 para. 18 (1988); *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part and denied in part*, 58 RR 2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802, 803-04 nn. 31-32 (1986); *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 para. 15 (1981). Non-voting shareholders generally lack the power to control corporate activities. *Victory Media*, 3 FCC Rcd at 2074 para. 14, citing *Ownership Attribution*, 97 FCC 2d at 1020-21. Moreover, we held in *Victory Media* that the role played by non- voting shareholders in the formation of an applicant is not necessarily dispositive of whether the applicant, once established, will be secretly managed by its passive investors, 3 FCC Rcd at 2073-74 paras. 8-9. We have also recognized that there may be legitimate business reasons for creating a corporation with non-voting classes of stock. We have, therefore, refused to hold that such arrangements are presumptively invalid for integration purposes. *Victory Media*, 3 FCC Rcd at 2075 para. 19. Nevertheless, we do not hesistate to discredit an integration proposal where convincing evidence reflects that the non-voting stockholder will exercise an active, rather than a passive role in the ongoing business. *Victory Media*, 3 FCC Rcd at 2074-75 para. 18.

*Susan S. Mulkey, supra*, 4 FCC Rcd at 5520-5521.

32. Applying these principles to Orlando 27, we affirm the ALJ's refusal to award 100% "integration" credit. As the *I. D.* reports, even after incorporation this applicant's "non-voters" were fully as active as its "voters" on all major corporate decisions. Specifically, they participated in decisions to permit a theretofore "voting" shareholder, Antonio Orizondo, to transfer his shares for "non-voting" stock (despite restrictions against such transfer imposed by the corporate "buy-sell" agreement), *id.*, para. 242; approved the substitution of a new "non-voting" shareholder, Dr. Ruben A. Telan, as a replacement for H. David Luff, *id.*, para. 244; specifically recommended a change in communications counsel, *id.*, para 249; regularly participated in discussions at board of directors meetings, affirmatively approving: (a) a transmitter site change, a change in directors, officers, and managers; (b) the adoption of amended stock subscription and "buy-sell agreements; and (c) the adoption of a proposed programming statement. *Id.* The "non-voting" shareholders also met with new communications counsel to discuss the applicant's "direction and course." *Id.* Moreover, all of the key corporate documents (*i. e.*, the articles of incorporation, the original and amended stock and subscription agreements, and the "buy-sell" agreements) were prepared by J. Gary Miller, an attorney with the Orlando law firm of Sanders, McEwan, Mims and Martinez, two of whose law partners are Orlando 27 "non- voting" shareholders. *Id.*, paras. 237, 245, 248, 370. Although Orlando

27 attempts to minimize the significance of the post-organizational involvement of its "passive" principals as merely responses to requests for information, or as informal discussions, the record is clear that their involvement was indeed "active" and influential. *See , e. g.*, Tr. 536-537, 721-725 ("non-voting" stockholders influential in changing communications counsel); Tr. 573-574 ("non-voting" stockholders regularly express, and directors consider, opinions on corporate agenda items); Tr. 817 ("non-voting" stockholders present at directors' meeting because of interest in whether corporation is operating "in their best interests"); Tr. 818 ("non- voting" stockholders participated in change of transmitter site); Tr. 820 (and proposed programming); Tr. 822-830 (and subsequent discussions with new counsel). The "non-voting" stockholders were, as we see it also, properly regarded by the ALJ "as active rather than as passive investors for purposes of the integration analysis." *Tulsa Broadcasting Group*, 3 FCC Rcd 4541 (1988). This applicant's "non-voting" shareholders have been anything but "passive throughout; and if the past is considered prologue, we see nothing here to indicate probable changes in any future management of Orlando 27. In sum, we award Orlando 27 no "integration" credit, and we affirm the ALJ that Orlando 27 is, comparatively speaking, far inferior to Reece (*inter alia*), and cannot prevail under any circumstances. [16]

33. *Highland*. This applicant was also projected as a "limited partnership," with six "limited" partners (five holding 14% equity each, with the sixth holding 20%). It seeks 100% "integration" credit based solely on the participation of Carmen Reid, its sole "general" partner, though she holds merely a 10% equity share. *I. D.*, paras. 258, 277, 379. Relying largely on *Independent Masters, Ltd.*, 104 FCC 2d 178 (Rev. Bd. 1986), [17] the ALJ awarded it only 10% credit. In its exceptions, Highland argues that the Commission has not reviewed *Independent Masters* (which settled on appeal), and has recently again extrapolated a 15% equity share into an 100% *constructive* "integration" credit. *Victory Media, supra*. On the current state of the law, Highland has a valid point in that a 10% equity interest has not been held, in and of itself, to be sufficient to devalue an "integration" claim. *See also Susan S. Mulkey, supra* (100% *constructive* credit awarded to 10% shareholder). But, the remaining question to be resolved here is whether or not the activities of Highland's "limited" partners, as reflected in the record evidence, are sufficient to view them as "active" rather than as "passive" investors, *see, e. g., Tulsa Broadcasting Group*.

34. As recounted in the *I. D.* (paras. 259-276), Highland was formed solely by its "limited" partners, its "general" partner not even being formally recruited until March 15, 1985, five days before its application was filed. All major pre-organizational activity occurred without the "general partner's participation. For example: (1) in February 1985, Washington communications counsel (Lewis Cohen) informed his client, John L. Rutledge, an experienced broadcaster, that Channel 27 in Orlando was available, and Rutledge, in turn, informed Orlando attorney Richard H. Adams, *id.*, paras. 268-269; Tr. 4004, 4020; (2) Rutledge hired both the consulting engineer, Bernie Segal, and the FAA consultant, John Allen, *id.*, para. 273; Tr. 4013- 4021; (3) Adams enlisted four of his law partners (Pleus, Divine, Fassett, and Anthony) as principals, *I. D.*, para. 270; (4) Adams suggested to Rutledge that the group should file the application and that Rutledge should receive 20% equity for unearthing the opportunity, Tr. 4011-4012; (5) Adams hired Gene Stewart to locate a transmitter site, Tr. 4045; (6) Cohen and Divine drafted the original limited partnership agreement, and Divine has been responsible fon drafting all subsequent amendments thereto, as well as filing them with the Florida Secretary of State, *id.*, paras. 274-275; and (7) Divine (at Adams' request) sought a financial commitment for the application. *Id.* Finally, Adams sought, and obtained, the assent of Reid, an acquaintance who worked as a law firm administrator, to be the entity's "general" partner, and soon thereafter (on March 15, 1985), the Highland agreement was signed.

35. At hearing, Reid testified that she agreed shortly thereafter to retain the same communications counsel and the same engineering, FAA, and transmitter site consultants already employed by Highland. *I. D.*, para. 273. The record evidence does not show any other significant post-organizational activity by Reid.

36. Highland's limited partnership agreement originally specified Reid's financial obligation to be 12.5% of prosecution expenses, while the five "limited" partners (all save Rutledge) were to contribute 17.5% each (as well as *pro rata* shares of Reid's expenses as "loans"). *Id.*, para. 259. However, Reid was to be indemnified to the extent of partnership assets. Highland Exh. 10 at 17. Also, an amendment dated April 4, 1989, provided that Rutledge would now be required to contribute $200, plus "all services required by the General Partner in connection with consulting and advising the General Partner with respect to the business of the Partnership." *I. D.*, para. 260. By a second amendment, dated September 5, 1985, Reid's contribution was limited to a $200 maximum. *Id.*, para. 261. These amendments were prepared by Divine and filed by him with the State of Florida. *Id.*, para. 275. Nevertheless, Adams testified that he has been more active in prosecuting the application than any other "limited" partner, including Divine. *Id.*, para. 276.

37. The record evidence discloses that the "limited" partners created Highland, that its putative "general" partner has only a token financial stake, and that no substantial actions were taken by the "general" partner after formation. As noted earlier, the Commission's most recent precedent appears to focus more heavily upon any post-formation activities of the principals, and here it was the "limited" partners rather than the putative "general" partner who appear to have been active during that period. The Commission and the Board have stressed the importance of consulting the *totality* of pertinent record evidence in assessing the legitimacy of "integration" proposals. *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988). *See also Revision of Form 301*, 4 FCC Rcd 3853, 3856 & nn.39, 41 (1989); *Royce International Broadcasting*, FCC 89R-57, released October 6, 1989, at paras. 29-38; *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-1495 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988).

38. In that regard, Highland's application was fully prepared, with the financial and site commitments secured and with the engineering data obtained, prior even to Reid's appearance. Further, although its partnership certificate expired on December 31, 1985, Reid testified that she had no personal role in attempting to renew it, but instead requested Divine to do so. *I. D.*, para. 267. Moreover, the initial amendment to the partnership agree-

ment expressly contemplated that Rutledge, the *only* Highland principal with broadcast experience, would "consult and advise" Reid. That provision was later deleted solely because Florida state law "does not permit limited partners to provide services for their partnership interests." *I. D.*, para. 264. Conversely, Reid's role in Highland was plainly limited to acquiescing in decisions already made by the "limited" partners, and her financial obligation remains token. *Compare Tulsa Broadcasting, supra*, 2 FCC Rcd at 6130 ("general" partners have only a minor financial stake and are "completely indemnified"). While the pre-organizational role played by "limited" partners is not "necessarily dispositive," the record shows scant *post* -formational activity by Reid. It also augurs that she will continue to rely upon, and defer to, the "limited" partners. But, even if we restored (*arguendo)* its "integration" credit, it would still lose to Reece's more substantial enhancements for civic participation and broadcast experience. *Compare I. D.*, paras. 186-193 *with id.*, paras. 280-283. *See generally Radio Jonesboro, supra*, 96 FCC 2d at 1108-1112, *aff'd* , 100 FCC 2d at 946-948; *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984) (subsequent history omitted). [18]

39. *Central Florida*. Another "limited partnership," Central Florida was at the time of the hearing composed of the following individuals: "general partner Marita Valentine Sapp (25% equity); Louis de la Parte (50% "limited partner); and Terrell Sessums (25% "limited" partner). *I. D.*, para. 285. Sapp, an area resident of Hispanic descent, has been civically active, as well as having some past broadcast experience, and is listed as Central Florida's proposed fulltime general manager. *Id.*, paras. 294-300. The ALJ awarded Central Florida 100% quantitative "integration" credit, with appropriate qualitative enhancements, but nevertheless concluded that Reece was superior overall to Central Florida. Thus, he determined that Reece's civic participation was of greater frequency and broader range, that its broadcast experience was more extensive, and that Reece received a slight preference over Central Florida for its comparative signal coverage. *Id.*, paras. 395-397. These advantages outweighed Central Florida's very slight edge over Reece for female ownership participation (100%-to-95.2%, by the ALJ's reckoning), *id.*, para. 397, a conclusion we affirm below, even after we increase Central Florida's female ownership edge (based on our constructive *reduction* to 50% of Reece's gender enhancement). *See supra* para. 19.

40. Various challengers here argue that, under *Cotton Broadcasting, supra*, 104 FCC 2d at 475-477, no "integration" credit should have been awarded Central Florida, because Sapp's dual roles for a time as "general" and "limited" partner were incompatible. Alternatively, it is contended that Central Florida should receive no more than a 25% "integration" credit, because her dual role destroyed the insulation of "limited" partners. However, as with Reece, these particular exceptions have been mooted by the Commission's reversal of *Cotton*. *See supra* para. 13.

41. In addition, Reece argues that Central Florida's "integration proposal should not be credited because, on the "B" cut-off date (May 6, 1985), Section 12.1(B) of its partnership agreement provided for dissolution of the partnership:

> Whenever Partners owning at least seventy-five percent (75%) of the total Units of Partnership Interest shall determine in writing that the Partnership shall be dissolved.

Central Florida Exh. 1A at 18. Reece Br. at 45-47. However, at that particular point in time, Sapp held 50% of the equity and, therefore, also held the balance on any question of dissolution. As Reece concedes, the offending provision was later deleted, with Sapp's equity share reduced to 25%, and Reece has nowhere alleged that the "limited" partners ever have had the actual ability to force dissolution of Central Florida. Reece next contends that the "limited" partners held an ability to control and influence the partnership because, on the "B" cut-off date, Section 6.3 of the partnership agreement provided that:

> The failure of any General or Limited Partner to contribute [capital] to the Partnership . . . shall result in an absolute suspension of such Partner's rights to and under his Partnership Interest.

Central Florida Exh. 1A at 6. However, Reece has not shown that Sapp might be unable to meet her financial obligations to the partnership, and the agreement nowhere provides for the substitution of any "limited" partner for a defaulting "general" partner. Instead, the agreement provides for a lien against the partnership interest of the defaulting partner, such lien to be enforceable only through "public or private sale." *Id.* It also provides for the continuing liability of the defaulting partner to the partnership. *Id.*, at 7. These provisions of the partnership agreement are, by themselves, insufficient under Commission precedent to deny "integration" credit. Moreover, upon the Commission's modification of its ownership attribution policies respecting "limited" partners, *see Ownership Attribution*, 58 RR 2d 604, 613-620 (1985), Central Florida (as Reece concedes) deleted the provision complained of. In sum, the record does not support Reece's legal arguments against Central Florida. [19] This being so, we deny Reece's companion exception that Central Florida should be assessed a "diversification" demerit, because (new) limited partner Jeannette Austin held a managerial position at Station WMFE-FM, Orlando, after the "B" cut-off date. *See Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934 (1986) ("mass media interests [of limited partners] . . . accorded non-cognizable status in the comparative hearing process").

42. *Florida TV*. Likewise represented as a two-tier corporation, Florida TV has the following shareholders: Mable Butler, 98% "voting" stockholder (19.6% equity); Aprille J. Meek, 2% "voting" and 18.55% "non-voting stockholder (18.95% overall equity); and "non-voting" stockholders William A. Watts (18.95% equity), Jean-Pierre Bleger (12.5% equity), Robert J. Pumpelly (12.5% equity), Erika M. Perkins (10% equity), and W. Wade Watts (7.5% equity). *I. D.*, paras. 306-308. Although Florida TV proposed the fulltime ownership integration of its two "voting" shareholders, Butler and Meek, into station management roles, the ALJ found that they "will not be free from the influence and control of the non-voting shareholders," *id.*, at para. 387, and he concluded that Florida TV must be "considered to be a one-tier corporation of whose shareholders only two are proposed to be integrated into management. *Id.*, para. 389. Consequently,

he credited Highland with "19.6% integration for the participation of Ms. Butler and 18.95% . . . for Ms. Meek." *Id.* We affirm the ALJ for the following reasons.

43. As was analogously the case with Highland, the evidence reveals that Florida TV was formed, and all key decisions made, by a "non-voting stockholder, William A. Watts. *Id.*, para. 311. Informed by counsel that Channel 27 was available, Watts contacted long-term friends who became the other "non-voting" stockholders. Tr. 841-842. By contacting other acquaintances, he met and offered Butler stock and the general managership, even though she had no prior broadcast or managerial experience. *I. D.*, para. 310; Tr. 844, 890. The "non-voting" stockholders have supplied all of the finances (including the $1,960 for Butler's equity), and Butler is obligated to repay her share only out of station profits or case settlement proceeds. Next, while Florida TV orginally specified that Butler would own only 49% "voting" stock, and Meek would own the remaining 51%, it amended (on the "B cut-off date) to specify that Butler would own 98%, and Meek only 2%. Butler admitted at hearing that the singular purpose of this last-minute change was to magnify the applicant's comparative enhancements. *I. D.*, para. 307; Tr. 4511. No *bona fide* business reason was offered and no consideration changed hands.

44. Consulting again the "totality of record evidence," we find that Butler has but a token financial stake in the applicant, *compare Tulsa Broadcasting, supra* ("general" partners indemnified), has engaged in scant post-formational activity, and has uniformly acquiesced in the prior decisions of the "non-voting" stockholders. It appears inevitable that she will continue to defer to them. For example, Florida TV does not dispute that Butler testified at her deposition that Watts would be available to her as a "consultant." Tr. 4543. Instead, Florida TV points to Butler's later hearing testimony that she no longer intends to consult Watts (and that Watts will not be involved in operation of the proposed station). However, despite this passing claim, the relevant evidence reflects that the "voting stockholders did indeed call upon Watts, who had previously obtained the original transmitter site and hired the original engineering consultant, for assistance in locating a new site. *Compare Tulsa Broadcasting, supra*, 3 FCC Rcd at 4541 (role in obtaining a new site indicates "activity" rather than "passivity"). In sum, Butler's deposition admission that she intended to consult Watts as the need arises, and the subsequent behavior of the "general partners in seeking Watts' assistance, show that Watts cannot be regarded as wholly "passive." *See Ownership Attribution, supra*, 58 RR 2d at 613-620 & n.67 ("passive" owner may not perform any service to the partnership materially relating to its media activities). Therefore, we will not restore any "integration" credit here. [20]

## COMPARATIVE ANALYSIS AND SUMMARY

45. We have affirmed the ALJ's financial disqualification of one applicant, Sunshine, which therefore is ineligible for comparative analysis. *See Louis Adelman*, 28 FCC 432 (1960), *recon. denied*, 29 FCC 1223 (1960), *aff'd sub nom. Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961). [21] The remaining applicants must be compared under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), in which an applicant's proposed ownership integration into management of the station was held to be a comparative "factor . . . of substantial importance." *Id.*, at 395. [22] Reece, Central Florida, and Marlin were awarded 100% quantitative "integration" credit. *See supra* paras. 19, 24, 39. This equates to an effective "integration" score of 10,000 under the Commission's novel "Hirschman-Herfindahl" method of calculation. *See Omaha TV 15, Inc.*, 4 FCC Rcd 730, 734 (1988); *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 & n. 1 (1989). The next closest applicant, Magic City, received 65% fulltime and 35% parttime credit (based on 20 hours per week ownership participation in management), *see supra* paras. 27-28, which equates to a total integration score of 7325 (which, in turn, is equivalent to regarding the applicant as receiving overall 73.25% fulltime quantitative integration credit). This resultant quantitative disparity in scores (10,000 vs. 7325) is sufficiently "clear" that it cannot be overcome by a consideration of qualitative enhancement factors. *Miracle Strip*, 4 FCC Rcd at 5066 (difference of 1250 points cannot be overcome by qualitative factors). Accordingly, Reece, Central Florida, and Marlin each receive a moderate ownership/management "integration" preference over Magic City, as well as a substantial preference over Orlando 27, Highland, and Florida TV, which have each received no "integration" credit whatsoever. *See id.*, at 5065-5066 (moderate preference for 10,000 vs. 7300 comparison in scores).

46. We next turn to the differences in qualitative factors among the three applicants with complete ownership integration into management of the proposed station: Reece, Central Florida, and Marlin. As between Reece and Marlin, Reece's 100%-to-42.85% edge for minority enhancement outweighs Marlin's 100%-to-50% edge for female enhancement, because "female ownership has less significance than . . . minority ownership . . . under the standard comparative issue." *Id.*, at 5066 (citing *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945, 947-948 (1985)). In addition, Reece has greater broadcast experience, for which we award a slight "integration" preference over Marlin. *See Radio Jonesboro*, 96 FCC 2d at 1112 & n.7.

47. Next, we address Central Florida's argument that its enhancements for local residence, civic participation and broadcast experience are each superior to Reece's. Central Florida's "general" partner (Sapp) has fifteen years of continuous local residence, compared to eight years for Mrs. Reece, and nine for her husband. This begets Central Florida only the very slightest preference for its local residence. *Cf. Vacationland Broadcasting, supra*, 97 FCC 2d at 496 (preference to applicant with 16 more years of local residence). [23] However, we agree with the ALJ that the Reeces have a somewhat weightier record of civic participation than Sapp. For example, the ALJ found that:

> Since 1982, Marsha Reece has been a member of the Links, Inc., a national service organization comprised predominantly of Black women. She has been a member of the By-laws Committee, the Publicity Committee, the International Trends and Services Committee, and the Social committee of the local Orlando chapter of the Links, Inc.

*I. D.*, at para. 186. Central Florida nonetheless argues that Mrs. Reece did not regularly attend monthly "luncheon" meetings, and that the ALJ simply ignored Mrs. Reece's own testimony. We find that it is Central Florida which has "simply ignored Mrs. Reece's own testimony"; she did attend "numerous committee meetings . . . throughout

the week . . . ." Tr. 1821. In addition, Mrs. Reece's activities with Food and Drug Administration (FDA) Health Fraud Task Force and Central Florida Association of Black Journalists and Broadcasters cannot be disregarded as "related to her employment." Hence, Central Florida's credit here is slightly inferior to Reece. *Compare I. D.*, paras. 186-190 *with id.*, paras. 296-298. Next, Sapp's primary claim to broadcast experience arises from her (ten-month) stint as host of a daily television program, her production of a Walt Disney television show (which aired in Mexico and South America), and several TV appearances. But, Mrs. Reece boasts a continuous broadcast vocation since 1975, which experience includes reporting, anchoring, news production and management, public affairs hostess, producing, writing, and editing. *I. D.*, paras. 191-192. And, Mr. Reece has produced and directed several documentaries, as well as having been involved in the television marketing and production of the Citrus and Gator Bowl parades. *Id.*, para. 193. The slight advantage here is to Reece.

48. But, even if a very slight overall "integration" preference were ceded to Central Florida, it would nevertheless be outweighed by Reece's comparative signal coverage preference. Reece would provide a third television service to 4679 persons in 92 sq. mi., fourth service to 19,450 persons in 209 sq. mi., and fifth service to 25,680 persons in 648 sq. mi. Central Florida, by contrast, would render only a fourth service to 5039 persons in 12 sq. mi. and fifth service to 4778 persons in 70 sq. mi. *Id.*, para. 325. Also, Reece would serve overall 2,488,669 persons in 12,739 sq. mi.; and Central Florida, 1,431,975 persons in 7,914 sq. mi. Thus, Reece's superiority in the provision of new service and in overall coverage entitles it to a slight-to-moderate coverage preference over Central Florida. *See Metro Broadcasting, Inc.*, 99 FCC 2d 688, 699 (Rev. Bd. 1984). This, in turn, outweighs what, at best, would be Central Florida's very slight "integration" edge. *Cf. Christian Broadcasting, supra*, 99 FCC 2d at 583 (integration edge based only on small qualitative differences less significant than comparative coverage). While the comparative case is close, we must affirm the ALJ's determination that Reece prevails.

49. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed December 14, 1988, and July 10 and 26, 1989 by Central Florida, Marlin Broadcasting, and Reece Associates, respectively, and filed August 11 and October 11, 1989 by Sunshine Television 27 ARE GRANTED, and the amendments ARE ACCEPTED;

50. IT IS FURTHER ORDERED, That the motion to compel discovery filed August 11, 1989 by Florida Television IS DISMISSED as moot; and

51. IT IS FURTHER ORDERED, That the applications of Marlin Broadcasting of Central Florida, Inc. (File No. BPCT-850319KF), Sunshine Television 27, Inc. (File No. BPCT-850320KN), Magic City Broadcasting, Inc. (File No. BPCT-850320KU), Orlando 27, Inc. (File No. BPCT-850320KX), Highland Communications, Ltd. (File No. BPCT-850320LA), Central Florida Television, Ltd. (File No. BPCT-850320LD), and Florida Television Company (File No. BPCT-850320LM) ARE DENIED, and the application of Reece Associates, Limited (File No. BPCT-850320KR) for a construction permit to establish a new television station at Orlando, Florida IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

## FOOTNOTES

[1] A ninth applicant, Orlando Television Partners, voluntarily dismissed its application pursuant to a settlement agreement and merged into Central Florida as a new "limited" partner. *See Memorandum Opinion and Order*, 3 FCC Rcd 6965 (Rev. Bd. 1988).

[2] Previously, the ALJ had resolved favorably to each applicant the air hazard issues designated in the *HDO*. *See I. D.*, n.2. No exceptions challenge these resolutions, and they are therefore final. 47 CFR § 1.277(a). In addition, the ALJ had also added an issue to determine whether Reece should be awarded a comparative preference for specialized programming, *Memorandum Opinion and Order*, FCC 85M-4116, released October 22, 1985 (ALJ), but he ultimately determined that no such award was warranted. *I. D.*, paras. 356- 360. Reece accepts to that ruling, *see infra* note 15.

[3] By letter of March 7, 1989, counsel for Sunshine advised the Board that it would not file reply exceptions.

[4] The Commission has just recently interpretated its 1981-version of FCC Form 301 to hold that no written documentation need have attended a financial certification; an applicant may later "provide substantial and reliable evidence" of fund availability. *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989); *Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1989).

[5] *But cf. Rural Cellular Service*, 4 FCC Rcd 2542, 2547 (1988)(recon. pending), where the Commission held that rural cellular applicants could demonstrate their financial qualifications based on funding commitments from "other recognized financial institutions," and it stated that:

> We are aware that many legitimate sources of financing exist apart from . . . banks and thrifts. We do not wish to exclude legitimate non-bank institutions that are in the business of lending money or raising equity, such as investment banking houses.

[6] *E. g.*, Central Florida Exceptions at 29-32.

[7] As will be more fully explained *infra*, while Rudolph Reece was not specifically identified as the new 75% "limited partner" in that "B" cut-off amendment, he was so listed in the partnership documents filed with the State of Florida for the short period until the agreement with the two Trusts was formalized. No party here denies that, for purposes of registering the Reece "limited partnership" in Florida, Mr. Reece considered himself merely a temporary "stand-in," pending finalization of the contract with the two Trusts.

[8] Reece Amendment of May 6, 1985, Exhibit 1B.

[9] Curious as it may seem, the FCC application form in use at the time did not require the identification, by name or identifying detail, of any "limited" partner. *See Revision of Form 301*, 4 FCC Rcd 3853, 3855 (1989).

[10] Reece's Petitions for Leave to Amend, filed July 15 and September 10, 1985, respectively, were apparently misfiled by the Commission's Dockets Branch, and may be found within the application file for former applicant RCTV, Inc., in Volume 2 of the original application docket folder.

[11] *See* Reece Petition for Leave to Amend, filed May 2, 1986, Att. 2 at. 2.

[12] *Id.*, Att. 2 at 3.

[13] *Id.*

[14] *Id.*

[15] Reece also excepts to the ALJ's conclusion that it had failed to prove it deserved a comparative preference for its proposed specialized minority- oriented programming. *See I. D.*, paras. 199-210, 356-360. Although this exception is nondecisional, because Reece prevails in any event, we shall briefly address it. To earn such a preference, an applicant must prove that: (1) there is a need for such programming in the proposed community of license; (2) the proposed programming will meet that need; and (3) such programming is not already available in reasonable amounts. *Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1170 (Rev. Bd. 1983), *modified on review*, 97 FCC 2d 61, 62 (1984); *George E. Cameron Jr. Communications*, 71 FCC 2d 460, 464-466 (1979); *Flint Family Radio, Inc.*, 69 FCC 2d 38, 42-46 (Rev. Bd. 1977). Here, the ALJ found that: Reece's sampling of 21 community leaders and 80 members of the general public was too small to be a reliable indicator of community need for the proposed programming; its community leader selection process was unexplained; Reece did not thoroughly survey television, cable, and radio stations serving the area as to their provision of minority-oriented programming, including programming not specifically designated as minority- oriented, but nevertheless addressing minority concerns; and a substantial amount of Reece's proposed specialized programming is, in fact, religious progamming, which Reece's own survey shows is currently readily available and therefore will not address an ascertained need. *I. D.*, paras. 358-359. Our review of the record evidence supports the ALJ's finding that Reece's showing was seriously flawed, and we therefore affirm his conclusion that no preference for proposed specialized programming was warranted.

[16] We also note that, even if Orlando 27 were awarded the 100% quantitative "integration" credit it seeks, it would still be qualitatively inferior, achieving at most 80% civic participation and female enhancement credits, and a 20% credit for broadcast experience. *See I. D.*, paras. 250-256.

[17] *See I. D.*, para. 381, where the ALJ relied on the *Independent Masters* Board's policy suggestion that, absent a showing of a "general" partner's particularly strong broadcast credentials, an equity share of less than 20% should not be extrapolated into a 100% ownership/management "integration credit.

[18] Moreover, and in any event, we could not grant Highland's application without first remanding the proceeding on an issue to explore the roles of its "limited" partners Adams and Rutledge in *Rockledge Radio, Ltd.*, 4 FCC Rcd 3465 (ALJ 1989). The ALJ presiding there found that an applicant created by Highland principals Adams and Rutledge was a sham, which recruited a purported "general" partner to front for its "limited" partners. Adams there appears to have played a prominent role, *see id.*, at 3467-3468. As a result of these findings, the Board refused to approve a settlement in which Adams, *inter alia*, would be a principal of the successor licensee. *See Rockledge Radio, Ltd.*, 4 FCC Rcd 5092 (Rev. Bd. 1989). Were we to find, after supplemental hearing, that Adams played a key role in attempting to project a sham applicant in *Radio Rockledge*, Highland's qualifications could be affected. The Board takes seriously any attempted abuse of the Commission's comparative processes, and would not reward fraud in one case with a Construction Permit grant to that same individual in another proceeding. Since Adams' role in the Rockledge sham is not entirely clear from that record, further exploration would be necessary here. *Cf. Allegan County Broadcasters, Inc., 83 FCC* 2d 371, 373-374 (1980).

[19] Also, we reject Reece's complaint that Central Florida's new merged "limited" partners, who comprised former applicant Orlando Television Partners, see supra note 1, have undue influence because Sapp is prohibited by the latest partnership amendment from dismissing the Central Florida application or disposing of the station's assets without their consent. We find that this provision is not inconsistent with Commission policy. *See Ownership Attribution, supra*, 58 RR 2d at 620-621 n.72.

[20] We also note the ALJ's finding (I.D., para. 309) that "nonvoting stockholder Perkins received her stock in consideration for the legal services provided by her husband, Roy F. Perkins, as Florida TV's communications counsel. Commission and Board precedent require that where communications counsel receives an ownership interest in the applicant in return for his legal services, counsel must be viewed as an "active" owner for "integration purposes. *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986); *Stanly Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5019-5020 (Rev. Bd. 1988); *Mark L. Wodlinger*, 3 FCC Rcd 3139, 3141 (Rev. Bd. 1988). However, here we are presented with another "nice" question respecting the application of the Commission's ownership attribution policies to a husband-wife situation, *see, e.g., Chester Associates, supra*, 2 FCC Rcd at 2030; specifically, whether or not Mrs. Perkin's equity share must be attributed to her spouse. While we do not reach this question (because Florida TV cannot prevail in any event), we again note that this fundamental stock-for-shares arrangement between Florida TV and counsel was not negotiated by the "voting" shareholders, but by Watts. I.D., para. 309. This further reflects Watts' active influence over the applicant, and the passive acquiescence of the "voting" shareholders.

[21] Nevertheless, we point out that even if Sunshine were basically qualified to be a licensee, and if, further, we agreed with Sunshine's exception that its proposed ownership "integration" of Ms. Adams and Ms. Watts should have been credited, Sunshine would still lose comparatively. This is so because we fully agree with the ALJ's conclusion that no qualitative enhancement for local residence, civic participation, minority ownership participation, or broadcast experience can be attributed to its putative 60% "voting stockholder Ms. English. See I.D., para. 352. Therefore, Sunshine would remain substantially behind Reece on these factors, a fact which Sunshine's sole potential advantage for female enhancement credit cannot offset. *See, e.g., Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1112 (Rev. Bd. 1984), *rev.denied*, 100 FCC 2d 941 (1985).

[22] Diversification of mass media control, the Commission's comparative "factor of primiry significance," *Policy Statement*, 1 FCC 2d at 394, is not decisive in this case, because none of the three applicants credited with 100% ownership/management "integration" have any attributable mass media interests.

[23] *See also* Reece Reply Findings of Fact and Conclusions of Law, filed September 16, 1987, at 69 (conceding a "slight preference" for local residence to Central Florida, which is outweighed by Reece's "otherwise greater qualitative enhancement credits").

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-487**

In the Matter of

Amendment of Section 73.202(b), RM-6855
Table of Allotments,
FM Broadcast Stations.
(Randolph and Brandon, Vermont)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 19, 1989; Released: November 9, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Stokes Communications Corporation (petitioner), licensee of Station WCVR-FM, Channel 272A at Randolph, Vermont, seeking the substitution of Channel 271C3 for Channel 272A at Randolph, and the modification of Station WCVR-FM's license to specify the higher powered frequency. In addition, petitioner requests the substitution of Channel 268A for vacant but applied for Channel 270A at Brandon, Vermont,[1] and the imposition of a site restriction on Channel 267A at Essex, New York.[2] Petitioner submits information in support of its proposal and states its intention to apply for the channel, if allotted.

2. Channel 271C3 can be substituted for Channel 272A at Randolph in compliance with the Commission's minimum distance separation requirements at the restricted site specified by the petitioner, [3] if Channel 268A is substituted for Channel 270A at Brandon. The allotment of Channel 268A at Brandon requires a site restriction of 2.5 kilometers (1.5 miles) east of the community.[4] We shall serve a copy of this *Notice* on the applicants for Channel 270A at Brandon.

3. Since the communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border, we must obtain concurrence of the Canadian government for the proposal.

4. As requested, we shall propose to modify the license of Station WCVR-FM at Randolph to specify operation on Channel 271C3 in lieu of Channel 272A in accordance with Section 1.420(g) of the Commission's Rules. Accordingly, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Randolph. If the proposal is adopted, the applicants for Channel 270A at Brandon will be permitted to amend their applications and retain cut-off protection, since the channels are of an equivalent class.

5. In view of the fact that Randolph, Vermont, could receive its first wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Brandon, Vermont | 270A | 268A |
| Randolph, Vermont | 272A | 271C3 |

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 270A at Brandon, Vermont, as follows:

Carole L. Pickett
1 North Park Place
Fairhaven, VT 05743

Bruce M. Lyons
314 Ivy PL 100 Wolf Road
Lebanon, NH 03766

Lewis Creek Broadcasters, Inc.
Lewis Creek Road
Charlotte, VT 05445

The Mirkwood Group
21 Franklin Street
Brandon, VT 05733

Bach 'n Roll Radio of Brandon, Inc.
5211 Wehawken Road
Bethesda, MD 20816

James G. Kirkpatrick
Box 369
Brookfield, VT 05036

Green Mountain Boys Broadcasting, Inc.
4907 Rutland Place
Alexandria, VA 22304

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **January 2, 1990,** and reply comments on or before **January 17, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Richard R. Zaragoza, Esquire
John Joseph McVeigh, Esquire
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W., Suite 800
Washington, D. C. 20037-1125
(Counsel for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] There are seven applications pending for the use of Channel 270A at Brandon, Vermont. The applicants are: Carole L. Pickett (BPH-890413MO); Bruce M. Lyons (BPH-890413MD); Lewis Creek Broadcasters, Inc. (BPH-890413NA); The Mirkwood Group (BPH-890412MH); Bach 'n Roll Radio of Brandon, Inc. (BPH-890413NG); James G. Kirkpatrick (BPH-890413NI); and Green Mountain Boys Broadcasting, Inc. (BPH-890413NM).

[2] Recently the Commission allotted Channel 267A to Essex, New York with a 2.9 kilometer site restriction in order to protect this proposal. *See Essex, New York,* 54 FR 31960, August 3, 1989.

[3] The restricted site coordinates are 43-59-30 and 72-36-18. The site is located 9.1 kilometers (5.6 miles) northeast of Randolph.

[4] The restricted site coordinates are 43-47-42 and 73-03-40.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-186**

In the Matter of

Amendment of Section 73.202(b), RM-6246
Table of Allotments,
FM Broadcast Stations.
(Prairie du Chien, Wisconsin)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 23, 1989; Released: November 9, 1989**

By the Chief, Allocations Branch:

1. At the request of Prairie Broadcasting Company (petitioner), licensee of Station WPRE-FM at Prairie du Chien, Wisconsin, the Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 2553 (1988), proposing the substitution of Channel 232C2 for Channel 232A at Prairie du Chien. The *Notice* also proposed the modification of the license for Station WPRE-FM to specify operation on the higher class co-channel. Petitioner filed comments restating its intention to construct the improved facilities. KRNA, Inc. ("KRNA")[1], licensee of Station KRNA-FM, Iowa City, Iowa, filed an unacceptable counterproposal which suggests the substitution of Channel 263C2 for Channel 232A at Prairie du Chien, rather than Channel 232C2, in order to permit the use of its preferred site for Channel 231C1 at Iowa City.[2] KRNA also suggests the substitution of Channel 232A for Channel 261A at Garnavillo-Elkader, Iowa. [3] Petitioner filed reply comments.

2. In reply comments, petitioner opposes the allotment of Channel 263C2 to Prairie du Chien on technical grounds. Petitioner states that the required site restriction for the allotment of Channel 263C2 at Prairie du Chien is unacceptable. Petitioner contends that the siting of Channel 263C2 would not permit its station to achieve a line-of-site transmission in the city of license because of terrain obstruction. It states that site availability would be difficult because the community location is "in a valley adjacent to the Mississippi River."

3. Based on the above discussion, we find the counterproposal filed by KRNA unacceptable for consideration because the allotment of Channel 263C2 to Prairie du Chien would not comply with the principal city coverage requirements of Section 73.315(a) of the Commission's Rules. In addition, although KRNA acknowledges that expenses for substitutions could be allocated in accordance with *Circleville, Ohio*, 8 FCC 2d 159 (1967), it did not express a willingness to reimburse or share in the reimbursement of Station KCTN(FM). Thus, no further consideration is warranted.

4. Channel 232C2 can be allotted to Prairie du Chien in compliance with the Commission's minimum separation requirements with a site restriction of 0.6 kilometer (0.4 mile) southwest of the city.[4] Therefore, we believe the public interest would be served by the substitution of Channel 232C2 for Channel 232A at Prairie du Chien, as that community's first wide coverage area FM service. As requested we are herein modifying the license of Station WPRE-FM to specify operation on the higher class co-channel in accordance with Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 26, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Prairie du Chien, Wisconsin | 232C2 |

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Prairi Broadcasting Company, Station WPRE-FM, Channel 232A, Prairie du Chien, Wisconsin, IS MODIFIED, to specify operation on Channel 232C2 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## FOOTNOTES

[1] KRNA is the proponent in a separate proceeding seeking to substitute Channel 231C1 for Channel 230C1 at Iowa City, Iowa, and to modify the license of Station KRNA-FM accordingly. *See* MM Docket No. 88-131, 3 FCC Rcd 2002 (1988).

[2] The substitution of Channel 231C1 for Channel 230C1 at Iowa City is also required in order to accomplish the substitution of Channel 230C1 for Channel 228A at Mason City, Iowa, in MM Docket No. 88-131.

[3] Channel 261A is currently licensed to Station KCTN(FM).

[4] The restricted site coordinates are 43-02-49 and 91-08-59. The restriction is necessary in order to avoid a short spacing to Station WZFR(FM), Channel 233A, Tomah, Wisconsin.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-488**

In the Matter of

Amendment of Section 73.202(b), RM-6932
Table of Allotments,
FM Broadcast Stations.
(Chenango Bridge, New York)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 23, 1989; Released: November 9, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Northeastern Broadcasting, Inc. (petitioner) requesting the allotment of Channel 238A to Chenango Bridge, New York, as its first local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 238A at Chenango Bridge conflicts with the proposed allotment of Channel 237A to Norwich, New York (RM-6905) since the two communities are located less than the required 64 kilometers between first adjacent Class A allotments. However, a staff study has found that Channel 281A can be allotted to Chenango Bridge without conflicting with any present or proposed allotment. Therefore, we are substituting Channel 281A for consideration herein.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status.[1] Petitioner states that Chenango Bridge is an unincorporated community within the Town of Chenango, and that the Town has a 1980 Census population of 12,233 persons. However, Chenango Bridge is not listed in the U.S. Census. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Chenango Bridge has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. Channel 281A can be allotted to Chenango Bridge in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence is required since Chenango Bridge is located within 320 kilometers (200 miles) of the U.S.- Canadian border.

4. We believe the public interest would be served by proposing the allotment of Channel 281A to Chenango Bridge, New York, since it could provide a first local service, if it is ultimately determined to be a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Chenango Bridge, New York | -- | 281A |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 2, 1990,** and reply comments on or before **January 17, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert A. Lynch
Independent Broadcast Consultants, Inc.
110 County Road 146
RFD 1, Box 312
Trumansburg, New York 14886
(Consultant to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] We note that Chenango Bridge is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 2890. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for this allotment are North Latitude 42-10-12 and West Longitude 75-52-24.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-489**

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Barnwell, South Carolina) — RM-6955

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 23, 1989; Released: November 9, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Radio WBAW, Inc. (petitioner) requesting the substitution of Channel 256C3 for Channel 256A at Barnwell, South Carolina, and the modification of its license for Station WBAW-FM accordingly.[1] Petitioner states that it will apply for the channel, if allotted.

2. Channel 256C3 can be allotted to Barnwell in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[2] As requested, we are also proposing to modify petitioner's license for Station WBAW-FM to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 256C3 at Barnwell or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 256C3 for Channel 256A at Barnwell, South Carolina, since it could enable Station WBAW-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Barnwell, South Carolina | 256A | 256C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 2, 1990,** and reply comments on or before **January 17, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence J. Bernard, Jr., Esq.
Ward & Mendelsohn, P.C.
1100 - 17th Street, N.W., Suite 900
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The license of Station WBAW-FM was modified to specify operation on Channel 265A in lieu of Channel 269A by *Report and Order* in MM Docket 88-590, adopted August 18, 1989.

[2] The coordinates for this allotment are North Latitude 33-13-25 and West Longitude 81-21-35.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-490**

In the Matter of

Amendment of Section 73.202(b), RM-6751
Table of Allotments,
FM Broadcast Stations.
(Kealakekua, Hawaii)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 23, 1989; Released: November 9, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Kona Broadcasting Systems, Inc. (petitioner), requesting the substitution of Channel 241C for Channel 221A at Kealakekua, Hawaii, and the modification of its license for Station KOAS(FM) to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted. Channel 241C can be allotted to Kealakekua in compliance with the Commission's minimum distance separation requirements.[1]

2. In support of its request, petitioner states that Station KOAS(FM) is the only operating FM facility on the north coast of the Island of Hawaii (the principal community of which is Hilo, on the south coast). Petitioner also notes that because of KOAS' presently-limited facilities, it cannot serve the entire north coast and uses an on-channel booster to augment its coverage. The full Class C facility would permit the station to move its transmitter site from its community of license to a point from which it can both provide fully adequate service to Kealakekua as well as new or improved service to other populations and areas on the northern side of the Island.

3. As requested, we shall propose to modify petitioner's license for Station KOAS(FM) to specify operation on Channel 241C. In accordance with Section 1.420 of the Commission's Rules, Station KOAS(FM)'s license may not be modified herein to specify non-adjacent Channel 241C if a competing expression of interest is received unless there is an additional equivalent class channel available for allotment. Petitioner states that Channel 268C can be allotted if such interest is expressed.

4. We believe the public interest would be served by proposing the substitution of Channel 241C for Channel 221A at Kealakekua, Hawaii, since it could enable Station KOAS(FM) to expand its coverage area. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| City | Channel No. Present | Proposed |
|---|---|---|
| Kealakekua, Hawaii | 221A | 241C |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 2, 1990,** and reply comments on or before **January 17, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Rainer K. Kraus
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20554
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 19-43-07 and West Longitude 155-54-38.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-470**

In re Applications of

| | |
|---|---|
| NJT LIMITED PARTNERSHIP (hereafter "NJT") | File No. BPH-870515ME |
| JOSIE FM LIMITED PARTNERSHIP (hereafter "Josie") | File No. BPH-870515MI |
| SOUTHERN ARIZONA BROADCASTERS (herafter "SAB") | File No. BPH-870515MW |
| BARTREE BROADCASTING (hereafter "Bartree") | File No. BPH-870515NB |
| OLD PUEBLO BROADCASTING, INC. (hereafter "Old Pueblo") | File No. BPH-870515NC |
| PEGGY C. BROWNE (hereafter "Browne") | File No. BPH-870515ND |
| F. E. M. RAY, INC. (hereafter "FEM Ray") | File No. BPH-870515NL |
| ARIZONA/CAPITOL COMMUNICATIONS, LTD. (hereafter "Capitol") | File No. BPH-870515NS |
| PLAYA DEL SOL Broadcasters (hereafter "Playa Del Sol") | File No. BPH-870515NX |
| ALFREHAR AMIGOS (hereafter "Amigos") | File No. BPH-870515OH |
| KEVIN M. & PATRICIA WODLINGER (hereafter "Wodlinger") | File No. BPH-870515NK (PREVIOUSLY DISMISSED) |

For Construction Permit for a
New FM Station on Channel 281A (104.1 MHz),
Tucson, Arizona

**HEARING DESIGNATION ORDER**

**Adopted: October 13, 1989; Released: November 9, 1989**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary matters.* On September 23, 1988, Wodlinger filed a petition for reconsideration and request for reinstatement *nunc pro tunc* of the August 24, 1988 action by the Chief, FM Branch, returning its application as unacceptable for filing for proposing facilities of 3 kW effective radiated power ("ERP") at 100 meters height above average terrain ("HAAT") thus exceeding the 3 kW ERP at 91 meters HAAT limitation imposed under Annex IV of the *Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, August 9, 1973, _____ U.S.T. _____, TIAS No. 7697 (hereafter "Treaty"). Wodlinger also tendered an amendment to remedy this admitted deficiency. In support of its petition, Wodlinger alleged that its application was "substantially complete" as filed and that its failure to comply with Annex IV was a minor defect, not rendering the application incomplete under 47 C.F.R. § 73.3564. Consequently, the applicant argues that "requiring an amendment to specify a lower antenna height is no more burdensome upon the Commission's staff than those numerous instances in which amendments are required to be filed."

3. Contrary to Wodlinger's assertion, compliance with the Treaty is part of the Commission's acceptability criteria. *See Mr. Vincent Bosquez d / b / a Westwind Radio Company*, 3 FCC Rcd 5235 (1988) (HDO); *LNJ Communications*, 3 FCC Rcd 2745 (1988) (HDO). Furthermore, the Commission is without jurisdiction to waive or to interpret provisions of that Treaty. *See Kerrville Radio*, 2 FCC Rcd 3441 (1987); *Educational FM Channel Assignment*, 43 RR 2d 1189, 1191 (1978). Because the staff properly determined that its application failed to comply with Annex IV of the Treaty and was thus unacceptable for filing, Wodlinger's submission of a curative amendment will not gain it *nunc pro tunc* status. *See Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518 (1986). Consequently, Wodlinger's petition for reconsideration must be denied.

4. *Other matters.* SAB and Capitol failed to certify that they were financially qualified in response to Section III of their original applications. On October 20, 1988, SAB submitted an amendment to its application to indicate that it had since become financially qualified. In its accompanying petition for leave to amend, SAB asserted that it "diligently filed its amendment prior to designation . . . less than two weeks after the period for filing petitions to deny," and that acceptance of the amendment would not unfairly prejudice other competing applicants, citing *Azalea Corp.*, 31 FCC 2d 561 (1971).

5. We note, however, that in its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to FM applications. Title 47 C.F.R. § 73.3522(a)(6) provides that predesignation amendments addressing the acceptability or grantability of an application filed subsequent to the 30-day amendment as-of-right period will be considered only upon a showing of good cause. Although SAB asserted "diligence" in pre-

paring its application, the applicant fails to put forth any fact to explain why the subject amendment could not have been filed in a timely manner. Moreover, its attempt to cloak its financial certification as a reporting amendment under 47 C.F.R. § 1.65 is similarly meritless. *See Primemedia Broadcasting Co.*, 3 FCC Rcd 4293, 4294 (1988). Consequently, we find that SAB has failed to establish good cause for acceptance of its October 20, 1988 petition for leave to amend which will, therefore, be denied and the accompanying October 20, 1988 amendment will be returned as untimely. Accordingly, issues concerning SAB and Capitol's financial qualifications will be specified below.

6. *Browne*. On October 7, 1988, FEM Ray filed a petition to deny the application of Browne, alleging that Browne's certification of site availability was not based on reasonable assurances from the owner of the proposed site. FEM Ray's petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications* ; *Amendment of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered herein. However, an opportunity to raise these allegations will be afforded FEM Ray post-designation pursuant to 47 C.F.R. § 1.229.

7. *Site coordinates*. Bartree, Old Pueblo, Browne, and Playa Del Sol have each indicated that they will co-locate their respective antennas on the existing tower of KJMM, Tucson, Arizona. According to the Commission's database, the accepted coordinates for this tower are N Latitude 32' 17' 36" W Longitude 110' 53' 40". Bartree correctly lists these coordinates. However, Old Pueblo listed the coordinates of the tower as N Latitude 32' 17' *28* ", W Longitude 110' 53' *42* "; Browne listed the coordinates as N Latitude 32' 17' *27* ", W Longitude 110' 53' *42* "; and Playa Del Sol listed the coordinates as N Latitude 32' 17' *28* ", W Longitude 110' 53' *42* ". Because the above applicants propose to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the subject applications, we are able to verify the tower location by taking official notice of the site coordinates found in our files for KJMM. Consequently, these discrepancies do not render the subject applications unacceptable in the instant case. Accordingly, Old Pueblo, Browne, and Playa Del Sol will be required to amend their applications by submitting corrective amendments to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *City Coverage*. In its *Memorandum Opinion and Order* in re *Implementation of BC Docket 80 - 90 to Increase the Availability of FM Broadcast Assignments*, MM Docket 84-231, 59 RR 2d 679 (1986), the Commission stated that

> [o]n our own motion, the Commission's staff has determined that Channel 281A can be allotted to Tucson with a site restriction of 6.8 km (4.2 miles) north and provide city grade coverage to approximately 95% of the city. As discussed in paragraph 4 of the *Order, supra*, due to the nature of the proceeding in attempting to provide additional service to large communities, the Commission is willing to waive § 73.315 of the rules so as to allot Channel 281A to Tucson.

59 RR 2d at 684.

9. In alloting Channel 281A to Tucson, the Commission assumed that city coverage of 95% could be achieved. Applicants to the instant proceeding, however, have asserted that city coverage of only 50-90% may be achieved. The Commission does not require waiver of 47 C.F.R. § 73.315(a) unless the proposed 70 dBu coverage falls below 80% of the principal community's residential area. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). The following applicants have proposed facilities with coverage at less than 80%, and have requested waiver of 47 C.F.R. § 73.315(a): NJT; Josie; SAB; Old Pueblo; Browne; Capitol; and Amigos. A city coverage issue will be added as to these applicants, since the other applicants in this proceding have demonstrated substantial compliance with the city coverage rule.

10. *Josie*. An engineering study reveals a discrepancy between the -8 meters listed for the antenna height above average terrain (HAAT) in Section V-B, Item 7(b)(3), and the -6 meters HAAT calculated from the average of the eight radials listed in Section V-B, Item 19. This discrepancy does not affect the acceptability of Josie's application since the use of either value for the antenna height above average terrain does not result in any violation of our technical acceptance rules. However, Josie will be required to supply an amendment providing the correct value in Section V-B, Item 7(b)(3) to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. *Environmental Assessment*. Engineering studies performed on the applications of Old Pueblo, Browne, and Plaza Del Sol have revealed noncompliance with ANSI C95.1-1982 exposure guidelines for human exposure to radiofrequency radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned in this instance that these applicants may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (Apr. 22, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the applications are subject to environmental processing under the Section 1.1307 criteria, the applicants must then submit an Environmental Assessment ("EA") containing the information delineated in the newly revised 47 C.F.R. § 1.1311. Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radiofrequency radiation exceeding specific standards. Since the proposals of the applicants above may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Old Pueblo, Browne, and Playa Del Sol will be required to file, within 30 days of the release of this Order, an Environmental Assessment with the presiding Administrative Law Judge.[2] In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

12. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right, July 23, 1987. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

| APPLICANTS | AMENDMENTS FILED |
|---|---|
| Josie | April 14, 1988 |
| SAB | July 28, 1987; April 7, 1988 |
| Bartree | October 11, 1988 |
| Old Pueblo | July 23, 1987 |
| FEM Ray | July 20, 1988; August 16, 1988; September 28, 1988 (Engineering) |
| Capitol | October 13, 1987; November 7, 1988 |
| Amigos | January 31, 1989 (Engineering) |

13. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Amigos have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Amigos would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

14. *FEM Ray.* In its application, Fem Ray requested an overall height AGL of 153 meters (including obstruction lighting) and 841 meters AMSL. These requested heights do not agree, however, with the heights of 153.9 meters AGL and 841.6 meters AMSL that are on file with the FAA and the Antenna Survey Branch (ASB). Accordingly, FEM Ray must file a corrective amendment clarifying this discrepancy with the presiding Administrative Law Judge within 30 days of the release of this Order or correct this discrepancy with the FAA and notify the presiding Judge of such correction within the time specified herein.

15. Section II, Item 4 of FCC Form 301 (October 1986) requires that each applicant specify its address (number, street, city, state) as well as the home addresses of each of its principals. Josie, Old Pueblo and FEM Ray have not completed Item 4 correctly. Accordingly, the above applicants must submit amendments which give all the information required under Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to SAB and Capitol, whether the applicants are financially qualified.

2. To determine whether the proposals of the following applicants would provide coverage of the city sought to be served, as required by 47 C.F.R. § 73.315(a), and, if not, whether circumstances exist which warrant waiver of that Section: NJT, Josie, SAB, Old Pueblo, Browne, Capitol and Amigos.

3. If a final environmental impact statement is issued with respect to Old Pueblo, Browne, or Playa Del Sol, in which it is concluded that any of the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by Amigos would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

19. IT IS FURTHER ORDERED, That the informal objection filed by Donald R. Diamond against the application of FM Tucson Limited Partnership IS DISMISSED AS MOOT.

20. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-3 hereinabove, Wodlinger's petition for reconsideration IS DENIED.

21. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 4-5 hereinabove, SAB's October 20, 1988 petition for leave to amend IS DENIED and its accompanying October 20, 1988 amendment IS HEREBY RETURNED.

22. IT IS FURTHER ORDERED, That, in light of paragraphs 4-5 and issue one, hereinabove, Bartree's petitions to deny the applications of SAB and Capitol ARE DISMISSED AS MOOT.

23. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 6 hereinabove, FEM Ray's petition to deny the application of Browne IS DISMISSED.

24. IT IS FURTHER ORDERED, That in accordance with paragraph 7 hereinabove, Old Pueblo, Browne and Playa Del Sol shall submit amendments to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, Josie will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That, in accordance with paragraph 11 hereinabove, Old Pueblo, Browne, and Playa Del Sol shall submit environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with copies to the Chief, Audio Services Division.

27. IT IS FURTHER ORDERED, That, in accordance with paragraph 14 hereinabove, FEM Ray submit the clarifying amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That, in accordance with paragraph 15 hereinabove, Josie, Old Pueblo, and FEM Ray must submit amendments to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Josie, SAB, Bartree, Old Pueblo, FEM Ray, Capitol, and Amigos ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

30. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

31. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**FOOTNOTES**

[1] By letter dated August 24, 1988, the Chief, FM Branch returned the application of Quinto Broadcasting Corporation (BPH-870515NF) as unacceptable for filing due to violation of the U.S. - Mexican Treaty. The applicant timely filed an application for review on September 30, 1988, which is now pending before the Commission. Further, pursuant to letter requests, the applications of William Henry Sauro (BPH-870515MZ) and Huerta FM Radio Limited Partnership (BPH-870515NH) were dismissed by letters dated December 12, 1988 from the Chief, FM Branch. In addition, the applications of FM Tucson Limited Partnership (BPH-870515MX) and Klecic Broadcasting, Inc. (BPH-870515MB) were dismissed pursuant to the applicants' requests by letters dated April 26, 1989 from the Chief, FM Branch. Accordingly, the informal objection filed by Donald R. Diamond against the application of FM Tucson Limited Partnership will be dismissed as moot.

[2] These studies must also include calculations of exposure levels measured at the base of the tower which account for the cumulative effect of the proposed facilities in conjunction with all other broadcast facilities and construction permits sharing the proposed tower. Specifically, the effects of any co-located AM, FM, or TV stations must be considered in the respective evaluations of radiofrequency exposure. In addition, if a fence is to be built, the applicants must indicate the distance from the base of the tower to the fence.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-21**

In re Applications of

| | |
|---|---|
| CARTA CORPORATION | File No. BPH-861230MA |
| FRESNO FM LIMITED PARTNERSHIP | File No. BPH-861230MB |
| JOHN MARSHALL HOOKER d/b/a JMH BROADCASTING | File No. BPH-861230ME |
| JOHN EDWARD OSTLUND | File No. BPH-861231MD |
| VALLEY RADIO LTD., A CALIFORNIA LIMITED PARTNERSHIP | File No. BPH-861231ME |
| LAURA H. NORMAN | File No. BPH-861231MI |

For Construction Permit for a
New FM Station on Channel 257A,
Fresno, California

**Appearances**

*Matthew H. McCormick* and *Harry C. Martin*, on behalf of Carta Corporation; *Lewis I. Cohen*, *John J. Schauble* and *Roy W. Boyce*, on behalf of Fresno FM Limited Partnership; *Terence L. Bruiniers*, on behalf of John Marshall Hooker, d/b/a JMH Broadcasting; *Eric S. Kravetz* and *Chester F. Naumowicz*, on behalf of John Edward Ostland; *John M. Shoreman*, on behalf of Valley Radio Ltd., A California Limited Partnership; *Irving Gastfreund*, on behalf of Laura H. Norman; and *Norman Goldstein*, on behalf of the Chief Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN**

**Issued: November 2, 1989; Released: November 13, 1989**

## PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, DA 88-110 (released February 19, 1988), the Assistant Chief, Audio Services Division, designated for a comparative hearing fourteen applicants for a new FM station at Fresno, California. During the course of this proceeding, eight applicants dismissed their applications,[1] so that at this time, six mutually exclusive parties continue to prosecute their respective proposals. These competing parties are: (1) Carta Corporation (Carta); (2) Fresno FM Limited Partnership (Fresno FM); (3) John Marshall Hooker d/b/a JMH Broadcasting (JMH); (4) John Edward Ostlund (Ostlund); (5) Valley Radio Ltd., a California Limited Partnership (Valley); and (6) Laura H. Norman (Norman).

2. The remaining issues in this proceeding are as follows:

> To determine whether John Marshall Hooker, as the 90 percent owner of the license of standard broadcast station KEAP, has executed an unauthorized transfer of control or assignment of license of that station;
>
> To ascertain whether Hooker has allowed control to pass to alien ownership;
>
> To examine whether Hooker's representations to the Commission concerning KEAP constitute a lack of candor to the Commission; and
>
> To determine whether under the evidence resulting from the foregoing issues, JMH possesses the requisite character qualifications to be a licensee of the Federal Communications Commission.[2]
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest.[3]
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. A prehearing conference was held on April 21, 1988. An Admissions session was held in Washington, D.C. on October 17, 1988. Hearing sessions were held on October 24, 25, and 26 and November 14, 15, 16 and 17, 1988. The record was closed on November 17, 1988. *Order*, FCC 88M-3961 (released November 21, 1988). Proposed findings of fact and conclusions of law were filed February 6, 1989; replies were filed February 27, 1989.

## FINDINGS OF FACT

*Carta Corporation (Carta)*

4. Carta is a California corporation with 1,000 issued and outstanding common voting shares. John Sonder owns 100% of those shares and is president and a director of Carta. He votes all of the stock. Sylvia Sonder is vice president, treasurer, and a director of Carta. Tami Sonder is secretary and a director of Carta. There are no other officers or directors. John Sonder and Sylvia Sonder are husband and wife. Tami Sonder is the daughter of John and Sylvia Sonder (Carta Ex. 1, p. 2; Tr. 908-909, 935-936). Carta's by-laws provide that the business and affairs of the corporation shall be controlled by the board of directors (Carta Ex. 4, pp. 4-5). Sonder testified that

management authority of the corporation is in his hands since, as president and 100% owner he can dismiss the Board of Directors and change directors (Tr. 908-909).

**Diversification**

5. John Sonder and Sylvia Sonder own 100 percent of Atlas Broadcasting Company, the licensee of KXEX(AM) in Fresno (Carta Ex. 2, p. 2, Tr. 905-906). If Carta's application is granted, John and Sylvia Sonder will sell their interests in KXEX(AM) (Carta Ex. 2, p. 3).

**Integration**

6. If Carta's application is granted, John Sonder will work at least forty hours a week as the General Manager of Carta's station. As General Manager, Sonder will oversee the station's construction and operation. He will ovrsee all aspects of the station's operation, including the programming, administrative, sales and promotion components. He will be responsible for implementing the station's equal employment opportunity program (Carta Ex. 2, 2).

7. Sonder has lived in Fresno since 1955 (Carta Ex. 2, p. 3). In 1965, Sonder helped organize and expedite publicity for Help in Emotional Trouble (Carta Ex. 2, p. 7). He has never been a director or officer of the group (Tr. 915-916). In early 1960, Sonder helped in the organization of the Central California Psychology Association, a professional organization of psychologists. Sonder ceased being a member about 8 or 9 years ago (Carta Ex. 2, p. 7; Tr. 916-917). Sylvia Sonder is a psychologist (Tr. 916). From 1968 to 1975, Sonder was a member of the Downtown Association, a merchants' group (Carta Ex. 2, p. 7; Tr. 918). He was involved in an attempt to change Fresno's parking regulations (Carta Ex. 2, p. 8). From 1979 to present, he has participated in the publicity efforts of the Comprehensive Drug and Alcohol Abuse Association of Central California (Carta Ex. 2, p. 7; Tr. 905). Sonder has held conferences and provided advice on how to obtain publicity (Carta Ex. 2, p. 7). Sonder is not a member, officer or director of the organization (Tr. 917-918).

8. From 1953 to 1955, Sonder was a copy writer and salesman at Station KTXN, Austin, Texas. In 1955, he sold time, wrote copy, and set up promotions at Station KGST in Fresno. Since 1962, when Sonder and his wife acquired the construction permit for KKEX(AM) in Fresno, Sonder has been the General Manager of that station. In that role, he has supervised and directed all aspects of the station's operation, including programming, sales, promotion and administration (Carta Ex. 2, pp. 3-4).

**AUXILIARY POWER**

9. Carta will install auxiliary power generating equipment (Carta Ex. 3, p. 2).

**Fresno FM Limited Partnership (Fresno FM)**

10. Fresno FM is a California limited partnership (Fresno FM Ex. 1). Jesus Cruz, the sole general partner, owns fifteen percent of the partnership (Fresno FM Ex. 1; Tr. 164-165). The limited partners, MR Associates, Frederik R.L. Osborne, and Ray Stanfield, each own 28.333 percent of the partnership. MR Associates is a partnership of Richard Rynd and Melvin A. Steinberg (Fresno FM Ex. 1).

11. Stanfield became interested in the Fresno allotment in early to mid-December 1986. He decided to become a participant in a Fresno application, along with other individuals who were also interested, if a general partner could be found (Tr. 524-526). Stanfield contacted Fernando Oaxaca, part owner of station KNSE(FM), with whom he had a business relationship, to see if he had any idea who might be interested (Tr. 527-528, 573).[4] He told Oaxaca he and his partners were interested in filing an application in Fresno and were looking for a general partner, preferably a minority, who had knowledge of the community and a background in radio. Stanfield also said they were looking for someone who possessed qualities such as honesty, integrity, good working habits, good reputation in the business community and who was well thought of by his employer (Tr. 575). Oaxaca gave Cruz, who was then employed at KNSE(FM), "a rather glowing recommendation" and said that if Cruz was interested, Cruz would be an "excellent" candidate (Tr. 571).

12. Cruz learned of the availability of the Fresno channel from Tom Castro, part owner and general manager of KNSE-FM (Tr. 186-188). Castro advised Cruz that the channel was open and that he was aware of individuals interested in applying for the frequency (Tr. 188). At Castro's suggestion, Cruz call Stanfield and they agreed to meet December 22, 1986 in Stanfield's office in the Los Angeles area (Tr. 188-189). Lewis Cohen, who is now Fresno FM's counsel, was present at the meeting. Stanfield told Cruz that he had asked Cohen to be there (Tr. 191). Stanfield wanted Cohen there so that he would be available to work on the application, assuming Cruz and Stanfield agreed to go forward with the application (Tr. 530). At the meeting, Stanfield did not mandate or even suggest that Cohen serve as the communications counsel. Also, Stanfield did not tell Cruz that Cohen had been his attorney in other matters (Tr. 480, 493, 533). Cruz did not consider the use of Cohen as lawyer for the applicant to be an issue since he needed an attorney and Cohen seemed to be decent and competent and someone he could work with (Tr. 496-497).

13. The meeting between Cruz, Stanfield and Cohen lasted approximately 1 - 1 1/2 hours (Tr. 535). During the meeting, Stanfield and Cruz did most of the talking. Cohen was, for the most part, a silent observer (Tr. 201). Stanfield told Cruz the intention was to form a limited partnership with Cruz as general partner and that the limited partners, who Stanfield identified, would put up all the money for prosecuting the application and, if successful, construction and three months operating expenses (Tr. 538). Cruz was offered a 15% equity interest in return for his managing the affairs of the limited partnership (Tr. 158, 538). Stanfield made clear he was only interested in being a passive investor (Tr. 425). Cruz considered the use of a limited partnership form to be an appropriate vehicle and the 15% equity interest to be reasonable and accepted the proposal (Tr. 192-194, 425).[5] Stanfield's decision to invest his money was not based solely on his one hour meeting with Cruz on December 22, 1986. He stated he decided to go ahead before personally meeting Cruz on the basis of his conversation with Oaxaca, Cruz' background and resume which were all positive. His meeting with Cruz confirmed his earlier decision to invest his money (Tr. 572).

14. After Stanfield and Cruz found each other to be acceptable partners and decided to go ahead, Cohen and Cruz held a separate meeting which lasted approximately

one hour (Tr. 200, 205). At this meeting, Cruz reviewed with Cohen the contents of a draft limited partnership which was complete except for information such as the identities of the principals, the location and the name of the applicant. Cruz filled in these blanks (Tr. 109-211, 240). The partnership agreement was signed on December 24, 1986 (Tr. 213). Also, at the December 22 meeting, Cruz and Cohen went over a blank application form (Form 301) line by line (Tr. 281). Cruz did not provide information about the limited partners called for in the form. Cohen had secured information concerning the limited partners prior to the December 22 meeting (Tr. 291). Cruz personally prepared the programming statement attached to the application. Also, Cruz provided the information for completion of the EEO section (Tr. 293-294, 473, 499-502, 509-510).

15. At the time Cruz and Stanfield decided to go ahead with the application, a decision was made to collect $10,000 from the limited partners and give the money to Cohen for engineering and legal expenses. Cohen determined that amount was needed as an initial outlay (Tr. 250-251, 258). The partnership had no checking account at that time (Tr. 251). Cruz opened a checking account on February 25, 1987, two months after formation of the partnership. Only Cruz is authorized to sign checks (Tr. 252, 254). At the December 22 meeting, Cohen suggested Robert Hoover as the consulting engineer to prepare the engineering portion of the application. Cruz, who had no prior experience in constructing a station, agreed with the suggestion and authorized Cohen to retain Hoover (Tr. 243-245). Hoover was also retained to secure a transmitter site. Hoover contacted Greg Dailey, a professional site locator, who obtained the site proposed by Fresno FM (Tr. 265-266). Legal costs, engineering costs and the costs of a site locator were all discussed at the December 22 meeting between Crux and Cohen (Tr. 474). Cohen was authorized by Cruz to pay these bills out of the $10,000 initial outlay (Tr. 247-248).

16. Fresno FM's projected construction cost estimate was obtained by Cohen from Hoover (Tr. 476). Cohen supplied this information to Cruz (Tr. 234, 237). Cruz personally prepared the operational budget for the first three months. The projected budget included staff salaries, rent, and other necessary items incident to operating a broadcast station (Tr. 226-227, 236). Cruz also arranged for publication of the public notice in a local newspaper and established the public file (Tr. 429-433). In addition to opening a checking account, Cruz, on his own, hired a certified public accountant in 1987 (Tr. 431-432). Other than the bills for the initial professional expenses which were sent to Cohen (Tr. 246), all bills are sent to Cruz (Tr. 452). Also, all subsequent capital calls have been made by Cruz alone, without any involvement of Cohen (Tr. 255-256, 259, 261).

17. Fresno FM's Limited Partnership Agreement provides that the limited partners shall not participate in the management of partnership affairs. Also, the limited partners are precluded from communicating with the General Partner on matters pertaining to the day-to-day operations of any media enterprise in which the partnership is involved (Fresno FM Ex. 1, pp. 5, 10). Cruz' only contacts with the limited partners, other than Stanfield, has been in connection with capital calls. Stanfield's only contact with Cruz aside from capital calls, has been the December 22 meeting discussed, *supra*, a breakfast with Cruz and Cohen on the morning of the taking of depositions and a meeting with counsel and Cruz prior to testifying in this proceeding (Tr. 198, 238-239, 261-264, 547-549). Stanfield has received from Cohen copies of pleadings filed in the case. He has not received correspondence or copies of bills. He has never discussed the merits of the case with him. His only conversations with Cohen concerned the date of the hearing and his testifying in the proceeding (Tr. 576-577).

**Diversification**

18. Neither Cruz nor Fresno FM has any ownership interest in a medium of mass communications (Fresno FM Ex. 2, p. 1). Frederik R.L Osborne is the controlling stockholder of Auburn Cablevision, Inc., which operates cable television systems in Auburn, New York and surrounding communties and is the licensee of AM station WAUB, Aurburn, New York (Tr. 212).

**Integration**

19. If Fresno FM's application is granted, Cruz will terminate his present employment and become the General Manager of Fresno FM's station. He will direct the station's operation, including the establishment and implementation of policies and the hiring, firing, and supervising of personnal. He will oversee programming, technical, sales and accounting operations and will be responsible for administering the equal employment opportunity program (Fresno FM Ex. 2, p. 4). He will work at least forty hours a week as General Manager (Fresno FM Ex. 2, pp. 4-5).

20. Cruz is a Hispanic who was born in Mexico. He graduated from high school in Tulare, California, which is forty-five miles south of Fresno (Fresno FM Ex. 1, p. 1). He lived in Fresno from 1976 to 1982. He currently resides in Ontario, California but will move back to Fresno if Fresno FM is successful in this proceeding (Fresno FM Ex. 2, pp. 2, 4). He graduated from California State University in Fresno in 1978 with a B.A. degree in Radio and Television Communications (Fresno FM Ex. 2, p. 1).

21. While residing in the Fresno area, Cruz participated in civic activities. From September 1977 to October 1980, Cruz attended monthly meetings of El Concilio De Fresno, which was the major social service organization for Hispanics in Fresno (Fresno FM Ex. 2, pp. 3-4; Tr. 454). These meetings lasted from one to 1 1/2 hours (Tr. 454). In October 1979, Cruz was the master of ceremonies of that organization's annual awards banquet (Tr. 455).

22. In August 1979, Cruz was master of ceremonies for a folkloric community concert and dance presented at Fresno Pacific College by Fowler High School (Fresno FM Ex. 2, p. 4; Tr. 455).

23. From September through December of 1979, Cruz produced and hosted several one hour bilingual current affairs programs for radio station FM 91 (Fresno FM Ex. 2, p. 4; Tr. 455). This volunteer work was separate from Cruz's employment at that station (Tr. 463-464). The topics covered included changes in the Catholic church, health and the use of contraceptives, and the Coors beer boycott (Fresno FM Ex. 2, p. 4). Cruz devoted three hours to each program (Tr. 455-456).

24. In 1978 and 1979, Cruz was a volunteer for two separate political campaigns for the Fresno City Council and Fresno City College Board (Fresno FM Ex. 2, p. 4).

He attended a volunteer training session, handed out leaflets, and talked to voters (Tr. 457). He worked in the two week period preceding each election (Tr. 456).

25. Cruz' broadcast experience spans a 10 year period. From June 1979 to 1980, Cruz was the full-time Promotion Coordinator for station KSJV(FM), also known as Radio Bilingual FM 91, in Fresno (Fresno FM Ex. 2, p. 2; Tr. 407). In that role, he made presentations to community organizations, leaders, and clubs, as well as church and school groups to inform them of the upcoming bilingual community radio station and how they could participate in the station (Fresno FM Ex. 2, p. 2).

26. From 1980 to 1982, Cruz was the Training Coordinator and a producer for that station. He was responsible for the production of public service announcements and musical programs in both English and Spanish. He was also responsible for the training of on-air volunteers, which were screened and selected to participate in a six week training program. The volunteers were taught FCC rules and regulations, on-air reading skills, and hands-on experience with the audio board. After completing the course, the volunteers were assigned three hour shifts as disc jockets. Cruz trained a minimum of forty volunteers. He also produced a twenty minute program which informed the public of job opportunities in the Fresco area (Fresno FM Ex. 2, pp. 2-3).

27. From February 1983 to June 1984, Cruz worked in Salinas, California as the News Director of KUBO Radio, which is licensed to Chular (Fresno FM Ex. 2, p. 3; Tr. 408). He was responsible for the production of news and public affairs programs. He made budgetary decisions for the news department. He also trained twelve volunteers in writing and reporting broadcast news (Fresno FM Ex. 2, p. 3).

28. For seven months beginning in June 1985, Cruz was Station Manager at KUBO. He administered the community bilingual radio station on a daily basis and coordinated with the Board of Directors on policy and financial planning. He also supervised the training of twenty-five community volunteers (Fresno FM Ex. 2, p. 3; Tr. 409).

29. From 1986 through August 1988, Cruz was an Account Executive for KNSE Radio in Ontario, California. He sought and obtained major advertising accounts, predominantly in the San Bernadino County area (Fresno FM Ex. 2, p. 3).

30. Since September 5, 1988, Cruz has been a sales and marketing consultant for KTNQ(AM) and KLVE(FM) in Los Angeles (Tr. 167-168). If Fresno FM's application is granted, Cruz will terminate his employment (Fresno FM Ex. 2, p. 4).

**Auxiliary Power**

31. Fresno FM will use auxiliary power generators (Fresno FM Ex. 2, 5).

**John Marshall Hooker d/b/a JMH Broadcasting (JMH)**

32. Hooker is an individual applicant (JMH Ex. 1).

**Diversification**

33. Hooker currently owns ninety percent of HBC, which is the licensee of daytime station KEAP-AM (JMH Ex. 2, pp. 1-2). Hooker will terminate all active involvement in the operation of KEAP-AM and will divest himself of all interest in that station "within the period permitted by the Commission" (JMH Ex. 3). At the hearing, Hooker sought to clarify that phrase to mean within three years of a grant of his application (Tr. 1319).

**Integration** [6]

34. If his application is granted, Hooker claims he will work at least forty hours a week as the General Manager of JMH's proposed station. As General Manager, he would purportedly perform the duties normally attendant to that position, including supervision of station staff and personnel, establishing station policy and format, and overseeing all aspects of station operations (JMH Ex. 2, p. 1).

35. Hooker has lived in an unincorporated area surrounded by the city of Fresno since 1947. (*Id.*). From mid-1967 to mid-1969, Hooker was a member of the Fresno Rotary Club and has been a volunteer in the annual fund raising drives of the American Cancer Society for the past three years (JMH Ex. 2, p. 2).

36. Hooker seeks integration credit for a "daytime AM station"[7] preference based on his management of KEAP(AM). However, Hooker is applying for his proposed station in his individual capacity (Hooker Ex. 1). HBC is the licensee of KEAP(AM) (Hooker Ex. 2, p. 1). Hooker is not the sole owner of HBC. (*Id.*).

37. In his direct testimony, Hooker detailed his management of KEAP-AM (JMH Ex. 2, p. 2):

> "From 1984, through January 1988 Mr. Hooker continued to work at the station on a substantial basis, averaging approximately 25 to 30 hours per week".
>
> "Since January, 1988 Mr. Hooker's daughter Jonna Hooker has served as General Manager of the station. Mr. Hooker still serves as President and Chief Executive Office of HBC Broadcasters spending approximately 10 hours per week at the station and devoting at least as much time, if not more, to station affairs during an average week even when not physically at the station. For example Mr. Hooker still personally monitors the sign-on and sign-off of the station each day."

(*Id.*)

38. Hooker's claim of "substantial" involvement in the day-to-day management of KEAP(AM) between October of 1984 and January of 1988 was severely undermined during cross-examination. Further, his claim that he devoted at least 20 hours per week to the station subsequent to January 1988 was also discredited. Specifically, he broke down his duties at the station between October 1984 and January 1988 (Tr. 1093-1105). He also detailed his duties performed away from the station during that time (Tr. 1179-1184). Similarly, he provided that information for the period after his daughter took over in January 1988 as General Manager (Tr. 1184-1196). Hooker estimated the time he devoted to each such activity on a weekly basis.

39. His time estimates for his responsibilities at the station between October 1984 and January 1988 totalled no more than a mere 4 1/2 hours on average per week (Tr. 1247-1254; 1259-1281). Hooker's time estimates for his duties performed outside the station premises during

that period totalled no more than a mere 2 1/4 hours per week (Tr. 1281-1293; 1316-1317). Thus, although Hooker claims integration credit and a daytime-only preference on the basis of working 25 to 30 hours per week on station business, Hooker could only account for 6 3/4 of those hours per week.

40. Hooker's daughter took over as General Manager of KEAP(AM) in January 1988 (Hooker Ex. 2, p. 2). Jonna Hooker spends approximately 20 hours per week at the station (Tr. 593).[8] Subsequent to January 1988, Jonna Hooker testified that her father spent approximately the same amount of time physically at the station per week as he spent there before she became General Manager (Tr. 609). Subsequent to January 1988, Hooker testified that he spent on average an equivalent amount of time on station responsibilities away from the station as he spent on those duties between October 1984 and January 1988 (Tr. 1281-1282). Thus, although he claims credit for spending at least 20 hours per week, "if not more," on those duties after January 1988, the total time which could be attributed to Hooker's performance of station duties amounts to no more than a mere 6 3/4 hours per week.

41. This total of a maximum of 6 3/4 hours per week must be further discounted because Hooker conceded that some of his time estimates included time spent on personal errands. For example, Hooker spent approximately 25 minutes, of the 2 1/4 hours spent on station business away from the station per week, on banking. This 25 minutes consisted of filling out deposit slips, depositing money, getting to and from the bank and waiting in line at the bank (Tr. 1284-1286). Hooker conceded that his time getting to and from the bank and waiting in line also included time spent on his personal banking affairs (Tr. 1286). He also testified that his daughter sometimes took care of the banking (Tr. 1183).

42. Similarly, Hooker spent some time away from the station each week meeting with potential and current clients. The time estimate given by Hooker for this activity, however, included time in which he functioned as a subcontractor for time brokers, reselling to advertisers the time which he had previously sold to KEAP(AM) time brokers and servicing trade accounts (Tr. 1291-1292; 1097-1099).

43. Furthermore, much of the time expended by Hooker on station business for which he claims credit involved matters of purely personal concern. For example, Hooker spent as much as one hour of the 4 1/2 hours he devoted at the station weekly to monitoring the logs for gaps in time (Tr. 1213-1215; 1247-1254). Hooker admitted that he undertook such monitoring solely for his own benefit (Tr. 1213-1217). Hooker also monitored the station's sign-on and sign-off daily to ensure that time brokers complied with their contracts with HBC (Tr. 1191-1196).

44. Similarly, Hooker critiqued the time brokers' salespersons while at the station solely for his own benefit. (*Id.*). He reviewed the advertising contracts of time brokers because of his curiosity and "personal interest" (Tr. 1266). Hooker also spent approximately one hour of the 4 1/2 hours per week at the station on matters involving equipment failures. Often, this time was spent merely watching others repair equipment (Tr. 1269-1270). Moreover, 45 minutes of the 2 1/4 hours Hooker devoted to station affairs away from the station involved reviewing magazines and mail (Tr. 1316-1317). Hooker spent half of this time weekly reviewing "junk mail" (Tr. 1317).

45. The possibility of Jonna Hooker serving at or managing Hooker's proposed FM station in Fresno, should Hooker be awarded the construction permit, has not been ruled out. In fact, she and her father have discussed that possibility several times (Tr. 605-606; 1189).

**Auxiliary Power**

46. JMH will install auxiliary power at its studio and transmitter sites (JMH Ex. 4).

**Transfer of Control/Alien Ownership/Lack of Candor Issues**

47. HBC Broadcasters, Inc. (HBC) is the licensee of station KEAP-AM, which is licensed to Fresno, California. Since 1974, John M. Hooker has owned ninety percent of HBC and John H. Burrows has owned the remaining ten percent. Since 1967, Hooker has been the only HBC principal involved in the station's management (JMH Ex. 2, p. 1).

48. Since October 1, 1984, nearly all of KEAP's air time has been sold to time brokers (Tr. 992). The maximum amount of time that HBC has retained in that period is 1 1/2 hours (Tr. 1018). From 1984 to 1988, the entire broadcast week except for Sunday from sign on to 3:00 p.m. was sold to brokers who programmed Spanish language programming (Tr. 992-993, 1032; JMH Ex. 6-A). The period on Sunday from sign on to 3:00 p.m. is brokered to several religious time brokers (Tr. 994). In 1988, the broadcast time after 6:00 p.m. on Saturday and 5:00 p.m. on Sunday has been sold to time brokers who program in English (Tr. 993-994). Currently, only fifteen minutes of time on Sunday is used by HBC (Tr. 994, 1017).

49. The time broker who purchased most of KEAP's air time in 1984 for Spanish language programming was Fresno Hispanic Radio, Inc. (Tr. 1032).[9] Leo Valdivia, who was not a United States citizen, owned sixty percent of that corporation, and Juan R. Meono owned the other forty percent (Tr. 1032-1033). After one year, Elias DeAlba replaced Valdivia, and Messrs. DeAlba and Meono signed a new time brokerage contract (JMH Ex. 6-A; Tr. 1033). Meona decided to withdraw in February or March 1986, and he officially withdrew from the agreement on June 5, 1986 (Tr. 1036-1037). San Joaquin Valley Hispanic Radio, Inc. (San Joaquin), a corporation owned by DeAlba, became the broker (JMH Ex. 6-B; Tr. 1036).

50. Later, DeAlba sold thirty percent of his interest in San Joaquin to Eugenio Bernal, a Mexican citizen (Tr. 1572; JMH Ex. 6-C, p. 4). An amendment to the agreement was prepared which purports to show Bernal as a ten percent shareholder, Fausto Rico Alvarez as a ten percent shareholder, and Ramon Pedroza Melendez as a ten percent non-voting shareholder (JMH Ex. 6-C, p. 4). The agreement is dated January 13, 1987. (*Id.*). In fact, stock was only issued to Bernal, and the other names were placed on the agreement only because they were providing funds to Bernal (Tr. 1579, 1582). Bernal signed their names on the agreement (Tr. 1589).

51. Late in 1987, DeAlba sold thirty percent of his shares to Jorge Gutierrez, a Mexican citizen, and his wife Joanne Gutierrez, an American citizen (Tr. 1573). Bernal directed DeAlba to sell them thirty percent of San Joaquin's shares (Tr. 1574). DeAlba initially dealt with Gutierrez, but the stock is held in Mrs. Gutierrez's name

(Tr. 1573-1574). Thus, DeAlba currently owns forty percent of San Joaquin, and Bernal and the Gutierrez family each own thirty percent (Tr. 1582-1583).

52. HBC has three employees: Hooker, Jonna Hooker, his daughter, and a disc jockey who works from 6:00 a.m. to 3:00 p.m. on Sundays (Tr. 593, 995). Since October 1984, HBC has had a maximum of four employees (Tr. 995).

53. HBC has no news director or any person designated as Program Director or Sales Manager (Tr. 996-997). Traffic functions for the Spanish language portion of the broadcast week are handled by San Joaquin's secretary. Ms. Hooker handles the traffic functions for the English language portion (Tr. 997). The broker's secretary answers the phones at KEAP. HBC does not employ its own receptionist (Tr. 998). A contract engineer, Scott Dean, maintains the station's equipment. Dean is paid a retainer of $200 a month plus $20 per hour for any emergency calls. San Joaquin reimburses HBC all of Dean's fees except those for emergency calls during periods not brokered to San Joaquin (Tr. 1000-1001).

54. San Joaquin has hired a general manager/business manager (Daniel Rodriguez), program director (Elezar Garcia), sales manager (Jimmy Fernandez), receptionist/traffic manager (Ramona), a salesperson (Carlos Cornell) and an announcer (Luis Perez) (Tr. 1641-1643). An employment report filed with the Commission shows that San Joaquin has ten full-time employees and four part-time employees (Norman Ex. 6, p. 3). Hooker claimed he has an inherent right to fire any San Joaquin employee, but no provision of the time brokerage contract or other agreement gives him that right (Tr. 1007-1008). Hooker never fired a San Joaquin employee (Tr. 1009-1010).

55. Under the time brokerage contract, HBC purportedly reserves the right to determine, select, supervise and control program content (JMH Ex. 6-A, 1). In practice, San Joaquin decides the content, topics and scheduling of programs (Tr. 1225). Rodriquez determines what topics will be covered in public affairs programming (Tr. 1021). HBC also reserves the right to refuse to air any material that is defamatory, in poor taste, or in violation of Commission standards (JMH Ex. 6-A, p. 1). It also reserves the right to preempt San Joaquin's programming to broadcast any special event of public importance. (*Id.*). No evidence exists that HBC has ever exercised any such right.

56. Hooker claims he has instructed San Joaquin to provide fifteen minutes of public affairs programming a week (Tr. 1227). San Joaquin has not complied with this directive (Tr. 1227-1228).

57. Hooker does not speak Spanish (JMH Ex. 6, p. 2). His only sources of information regarding the programming are logs, information in the station's file, and Dick Delgado, a time broker who voluntarily monitors KEAP's Spanish language programming for Hooker (Tr. 1023-1024).

58. San Joaquin has guests that are interviewed on its public affairs programs fill out a sheet listing the most significant problems in the community (Tr. 624). While the guests are asked to state what they will discuss on the air, there is no assurance that any topic listed on the sheets is actually discussed (Tr. 624, 1511). San Joaquin's traffic manager/receptionist then uses sheets to prepare a quarterly list of the most significant problems facing the community (Tr. 1506-1509). Hooker is uncertain exactly how the receptionist decides what problems are included on the list (Tr. 1506-1507). The lists were not used to decide what topics would be covered in public affairs programming (Tr. 1508-1509). No procedures exist for ensuring that significant community problems are dealt with in KEAP's programming (Tr. 1511). HBC's general manager, Ms. Hooker, merely verifies that the San Joaquin employee, does, in fact, prepare the lists (Tr. 1504-1505). Hooker looks at the sheets twice a year but does nothing with them (Tr. 1507).

59. Delgado monitors KEAP's Spanish language programming as a favor to Hooker (Tr. 1028). Delgado contracts for time from HBC and subcontracts for time from San Joaquin (Tr. 993-994, 1645-1646). In addition, he also acts as an announcer for San Joaquin (Tr. 1646). Until May 1988, Delgado's only reports to Hooker were informal conversations (Tr. 1029-1030). Until that time, Hooker never took any action based on Delgado's reports (Tr. 1029). Starting in May 1988, Delgado provided a weekly written report (Carta Ex. 7). The reports are written forms with "Yes" and "No" responses for profanity, discussions in bad taste, excessive record exploitation, excessive commercials, and PSAs run each hour. (*Id.*). Delgado is not compensated for his monitoring (Tr. 1027).

60. Hooker acknowledged Delgado's monitoring was done on an intermittent basis. Hooker has no understanding with Delgado as to how often he (Delgado) should spot-check KEAP (Tr. 1278). Hooker does not even know how much time Delgado devotes to monitoring KEAP on a weekly basis (Tr. 1740).[10] Hooker concedes that Delgado is HBC's primary source of information as to what is broadcast during the Spanish language portions of KEAP's airtime (Tr. 1205).

61. San Joaquin was affiliated with SIS, a Spanish language entertainment programming service (Tr. 1045-1046). It was also affiliated with Spanish Coast-to-Coast Limited, a news service (Tr. 1045). Daniel Rodriguez, San Joaquin's General Manager, entered into affiliation agreements with those entities and listed San Joaquin as the licensee of KEAP (Tr. 1045; JMH Ex. 6-G). Hooker sent telegrams to those services claiming that HBC is the licensee of KEAP and that the agreements were unauthorized (JMH Ex. 6-G). The time brokerage contract provides that San Joaquin can contract in its own name for broadcast services but that it must identify itself as an independent contractor of HBC (JMH Ex. 6-A, p. 3).

62. Under the time brokerage contract, San Joaquin is required to directly pay all operating and overhead expenses for the station's operation (JMH Ex. 6-A, p. 2). San Joaquin has paid all such expenses (Tr. 1596-1597). HBC pays the bills and San Joaquin reimburses HBC (Tr. 1003). These expenses include electricity, telephone, gardening, cleaning, engineering, maintenance expenses and music license fees (Tr. 1001-1002). San Joaquin pays social security and withholding taxes with regard to its personnel (Tr. 1007). San Joaquin would have to pay any forfeiture assessed by the Commission with regard to the time when San Joaquin operates the station (Tr. 1010-1011). San Joaquin paid for the construction of new offices in the station building, although Hooker owns the building (Tr. 1568-1569, 1599). San Joaquin pays real estate taxes on the building (Tr. 1598). It also carries liability and libel insurance (Tr. 1598-1599). HBC does not pay for any insurance out of its own funds (Tr. 1740).

63. The time brokerage contract requires San Joaquin to provide Hooker with monthly affidavits stating that it and its employees have complied with the Commission's rules and regulations (JMH Ex. 6-A, p. 4). DeAlba repeatedly claims that such affidavits had been provided (Tr. 1602-1603, 1606, 1697, 1706). No documentary evidence to corroborate that assertion was proffered. Hooker denied that any affidavits were prepared (Tr. 1717-1718). A document was prepared which recited that San Joaquin had not provided those affidavits during the first two years of the agreement (Tr. 1703).

64. Under the time brokerage contract, San Joaquin is responsible for ensuring that the station will be operated in conformance with the Commission's rules (JMH Ex. 6-A, p. 4). Hooker does not monitor San Joaquin's programming for compliance with the Commission's rules and policies except to the extent that Delgado monitors the programming (Tr. 1518-1524, 1530-1535).

65. A 1987 Annual Employment Report was filed for KEAP by Daniel Rodriguez of San Joaquin (Norman Ex. 6). San Joaquin was listed as the respondent. (*Id.*). Hooker did not know that Rodriguez had filed that report (Tr. 1330). Hooker claimed that Rodriguez lacked the authority to file the employment report (Tr. 1334). No evidence exists that Hooker filed a 1987 employment report (Tr. 1340).

66. HBC did not file a 1987 ownership report in a timely manner (Norman Ex. 7). On January 12, 1988, the Commission sent HBC a letter stating that no ownership report had been received for KEAP. (*Id.*). Hooker never received that letter, although it was addressed to the station (tr. 1345-1346). No ownership report was filed in response to this letter, although a certification was filed in lieu of a 1988 ownership report (Norman Ex. 8; Tr. 1374).

67. Hooker essentially has no procedures in place to ensure that San Joaquin or HBC's other brokers are complying with the Commission's rules or the Communications Act. For instance, he does not have in place any monitoring practice or methodology through which he can assure himself that the "lowest unit charge" requirements pertaining to political advertising are, in fact, being complied with (Tr. 1242). Nor does he have any procedure established to ensure that forms regarding requests for political time are being filled out (Tr. 1235-1236). Nor does Hooker have any procedures (a) to document what time, if any, is given free of charge to political candidates; (b) to ensure compliance with the equal opportunity provisions of Section 315 of the Communications Act or (c) to ensure, with respect to political programming, the sponsorship identification requirements of the Communications Act are satisfied (Tr. 1244-1245).

68. With respect to sponsorship identification generally, there is no written procedure in place to ensure that legal requirements are met (Tr. 1246). The only type of directive Hooker has provided is that there can be "no teaser type of commercial spot" (Tr. 1246-1247).[11] Furthermore, there is no monitoring procedure in place to ensure that double billing of cooperative advertising accounts does not occur (Tr. 1258). Regarding lotteries, Hooker acknowledged that he has never explained the Commission's rules and policies to representatives of San Joaquin or Delgado except in the "loosest of terms" (Tr. 1487).

69. Hooker further testified he never discussed, advised or instructed anyone at San Joaquin, other than the manager, concerning the prohibitions on payola or plugola (Tr. 1518-1519). No procedures are in place to ensure that payola or plugola was not, in fact, taking place at KEAP (Tr. 1520). Hooker said it was Delgado's function to know if there might be some plugging or some under-the-table consideration going to one or more of San Joaquin's air talent. Hooker conceded that he had never instructed Delgado that this was one of his assigned duties (Tr. 1520-1521). He further conceded that he was not in a position to know if payola or plugola was going on at KEAP (Tr. 1522).

70. HBC has no procedures to ensure that San Joaquin's sales staff is not misrepresenting KEAP's ratings or coverage or to assure that San Joaquin is not broadcasting any false, misleading or deceptive advertising (Tr. 1530).

71. During the last six years, HBC has not contacted the recruitment sources listed in KEAP's model EEO program. Nor has HBC monitored San Joaquin's EEO efforts (Tr. 1538, 1542).

72. In September of 1985, HBC granted DeAlba and Meono an option to purchase fifteen percent of HBC's stock each year at the time the agreement was renewed. The price for each fifteen percent interest was $100,000 of which up to $36,000 could be a credit for their monthly brokerage payment (JMH Ex. 6-D, 1). If DeAlba and Meono had purchased thirty percent of HBC's stock by 1991, they would have had the right to purchase all of HBC's stock (JMH Ex. 6- D, pp. 1-2). A proxy agreement gave Hooker and Burrows the right to vote all HBC stock until the brokers acquired all of the stock (JMH Ex. 6-D, pp. 4-5). When San Joaquin became the broker, it assumed the option (Tr. 1050). The brokerage contract and option agreement were filed with the Commission (JMH Ex. 6, p. 4).

73. In May or June of 1987, HBC and San Joaquin established a trust account with $80,000 of money from San Joaquin (Tr. 1053-1054). DeAlba and Hooker were signatories on the account (Tr. 1053). The money was earmarked partially for the purchase of HBC stock by San Joaquin (Tr. 1054). A portion of the money was owed to HBC, but that money was not paid directly to HBC because San Joaquin wanted the money to be credited to stock purchases. (*Id.*). This account was dissolved in October 1987 because San Joaquin was having tax problems, and DeAlba took $33,000 out of the account (Tr. 1053). $43,000 were placed into HBC's regular account. (*Id.*). Later, DeAlba received $7,000 from HBC's account to meet those tax problems (Tr. 1053, 1056).

74. In early 1988, another trust account was established with $50,000 (Tr. 1058). Mr. and Ms. Hooker were the only signatories on that account. (*Id.*). The second account was established for "tax purposes" according to Hooker. HBC had reported that part of the funds from San Joaquin were funds for the purchase of stock, and the second account was established to satisfy the IRS that a reserve for a stock purchase by San Joaquin existed (Tr. 1058- 1059). The money came from HBC accounts (Tr. 1060-1061). No stock has actually been transferred to San Joaquin (Tr. 1062).

75. Hooker is still interested in selling stock to San Joaquin (Tr. 1071). Messrs. Bernal and DeAlba are still interested in buying HBC's stock. (*Id.*).

76. The fees paid by San Joaquin pursuant to the time brokerage agreement (denominated as "rent payments" by JMH) from October 1985 to Septmber 1988 totalled

$225,663.70 (Carta Ex. 5, p. 1). Additionally, over the same period, San Joaquin reimbursed HBC $87,897.32 in operational expenses. (*Id.*, pp. 3-4).

77. *Joint Sales Proposal.* In April or May of 1988, Bernal suggested that representatives of San Joaquin meet with representatives of Station KXEX(AM), Fresno, which also broadcasts a Spanish language format, to discuss the possibility of a joint sales effort. Both San Joaquin and KXEX were using the same national representative, Caballero. DeAlba testified he had serious doubts as to the practicality of this proposal, but agreed to attempt to arrange a meeting with KXEX personnel to discuss the possibilities. A meeting was scheduled for May 9, 1988. The meeting was ultimately arranged through Tony Rabago who was then the Program Director at KXEX (JHM Ex. 7, p. 3). Present at the meeting were DeAlba, Bernal, Daniel Rodriguez (San Joaquin's business manager) and, on behalf of KXEX, Rabago and Dr. Sylvia Sonder.

78. From this point, DeAlba's and Dr. Sonder's account of the meeting differ in numerous respects.[12] DeAlba said the meeting was at 10:00 a.m., that it was a breakfast meeting and that Dr. Sonder paid the bill (Tr. 1613). Dr. Sonder said she did not notice anyone having breakfast and she did not pay for anyone's breakfast (Tr. 1768).

79. DeAlba claimed in his written exhibit that Bernal spoke in Spanish and his comments were translated to Dr. Sonder in English by Rabago or himself (JMH Ex. 7, p. 4). However, at hearing, DeAlba said Bernal presented the proposal in English. Dr. Sonder said Bernal spoke to her in English exclusively and that he was fluent in English (Tr. 1772).[13]

80. According to DeAlba, at the meeting, Bernal described his experience in production and radio advertising in Mexico. The representatives of San Joaquin discussed with Dr. Sonder the possibilities of joint sales efforts. *Id.* Both DeAlba and Dr. Sonder agree that Dr. Sonder asked what authority San Joaquin's representatives had to discuss these matters. *Id.*; Tr. (1770-1771). According to DeAlba, both he and Bernal repeatedly informed Mrs. Sonder that "we had obtained approval from Hooker to initiate these discussions." *Id.* According to Dr. Sonder, however, "They both mentioned that they controlled six days out of seven or six-sevenths of the broadcast time on KEAP and therefore they did not need any authority from Hooker to make this proposition to me" (Tr. 1773). The clear understanding Dr. Sonder received from Messrs. DeAlba and Bernal was that Hooker had very little to do with running KEAP (Tr. 1805). Regarding the ownership of the station, DeAlba told Dr. Sonder they were in the process of purchasing KEAP, that they had already paid $100,000 in 1986, another $100,000 in 1987 and that there was a remaining balance of $400,000 which they expected to take care of "pretty soon" (Tr. 1773). Bernal told Dr. Sonder that one of the main reasons he was in Fresno was to complete the purchase of KEAP (Tr. 1802-1803).

81. In his testimony, DeAlba claimed that both he and Bernal advised Dr. Sonder that San Joaquin had options to buy stock in the radio station and "that we were considering a purchase of the radio station at some time in the future" (JMH Ex. 7, p. 5). DeAlba claimed that neither he nor Bernal nor Rodriguez told Ms. Sonder at any time that they were presently buying the station or that Hooker had nothing to do with the station (JMH Ex. 7, p. 5).

82. At some point in the meeting, Messrs. Bernal and DeAlba told Dr. Sonder they would provide her with written documentation from Hooker of their authority (JMH Ex. 7, p. 4). Another meeting was set for Monday, May 16, 1988 (Tr. 1775). Subsequently a memo from Jonna Hooker was delivered to Dr. Sonder. The memo, directed to DeAlba and dated May 19, 1988, said HBC had no objection to San Joaquin's personnel soliciting advertising in combination with another Fresno radio station. The memo did not make reference to Bernal (JMH Ex. 6H). No subsequent meeting was held.

**John Edward Ostlund (Ostlund)**

83. Ostlund is an individual applicant (Ostlund Ex. 1,p. 1).

**Diversification**

84. Ostlund is the sole owner, director and President of Jeffrey/Scott Advertising, Inc., an advertising agency (Ostlund Ex. 1, p. 4). This agency places advertisements on seven FM stations, two AM stations, four television stations and cable systems serving Fresno and the surrounding area (Tr. 651-652). The agency places around $200,000 (less than 10% of its total media dollars) of advertising in the Fresno market on an annual basis (Tr. 663). Jeffrey/Scott is the fourth or fifth largest of approximately forty advertising agencies in Fresno (Tr. 714-715). Of these 40 agencies, about 30 do broadcast media advertising (Tr. 715). If his application is granted, Ostlund will continue to own the agency. However, Ostlund asserts he will have no input into day-to-day operations including the agency's decisions on where advertising is placed (Ostlund Ex. 1, pp. 4-5; Tr. 726).

85. Ostlund was married in November 1987. From that time until October 1, 1988, Mrs. Ostlund was the Business Manager of KFYE-FM in Fresno (Ostlund Ex. 1, pp. 5-6).

**Integration**

86. If Ostlund's application is granted, he will work at least forty hours a week as the General Manager of his station. As General Manager, he will supervise overall station operations, including its sales, programming, promotional and internal administrative activities (Ostlund Ex. 1, p. 1).

87. As discussed above, Ostlund intends to maintain his 100% ownership of the Jeffrey/Scott Advertising. Currently, Ostlund manages the agency on a full-time basis. He testified, however, that upon grant of his application he would reduce his involvement in the agency's ongoing business activities to no more than five hours per week so that he would be able to manage the radio station on a full-time basis. Ostlund's involvement in the agency business will be limited to generally overseeing its operations and insuring that they continue to run smoothly (Ostlund Ex. 1, p. 4). Ostlund asserts he will be able to reduce his hours by assigning his current day-to-day responsibilities to "experienced employees." His duties on the administrative side of the business will be handled by the agency's present business manager, who will make decisions about client-agency relationships, handle employee relationships within the agency, and otherwise oversee the agency's general operations. The creative aspect of the agency's business will be supervised by the current Creative Director, who will sign-off on creative work which needs to be

evaluated and proofread, as Ostlund now does. In addition, the firm's present account supervisor will take over the accounts which Ostlund personally has maintained, and the account assistant will continue to process media insertion orders as she does at present, but without Ostlund's participation. Ostlund asserts that with these changes he will be able to reduce his involvement with Jeffrey/Scott Advertising to no more than five hours per week. He plans within this time frame to meet with the persons he places in charge of the agency's operations twice per week, once on Monday and once on either Thursday or Friday, to receive department reports and to review the status of accounts, its creative products and the agency's income and expenses (Ostlund Ex. 1, pp. 4-5).

88. Ostlund's present address where he has lived for the past eight years, is 521 N. Circle Drive, Fresno, California 93704. That location lies within Fresno County and is entirely surrounded by the City of Fresno, but it has not been incorporated into the city itself. Prior to moving to N. Circle Drive, Ostlund lived on Maroa Avenue, within the Fresno city limits, for six years (Ostlund Ex. 1, p. 1).

89. For the past four years, Ostlund has helped the Fresno YWCA publicize its services and raise funds. He designs and produces brochures, public service announcements and other materials. Projects he has worked on include the Garden House Tea Room, the Women-Tot Project, and the YWCA's annual fundraising. Ostlund was invited to sit on the committee which nominates the YWCA's Board of Directors from April 1987 to April 1988. He has devoted an average of one hour a week to the YWCA (Ostlund Ex. 1, pp. 1-2).

90. Ostlund has helped publicize and promote the Fresno County Clean Committee (since 1984) and the Central Valley Children's Services Network (in 1986). He has spent around two hours a month writing and producing public service announcements for the Fresno County Clean Committee. In 1987, he produced a narrated tour of the Fresno Metropolitan Museum. In 1984 or 1985, he helped the "Play It Safe Campaign," an organization devoted to child safety, obtain a truck. In the middle of 1985, he helped the "It's a Crime Rally" obtain a car for a raffle. In April 1988, Ostlund hosted two students at his job for the Central Lions Club of Fresno's Central High School. Ostlund helped the students understand the advertising agency. Finally, since 1978, Ostlund has spoken about three times a year to the Advertising Procedures Class of the Department of Journalism at California State University, Fresno. He has also offered internships to students (Ostlund Ex. 1, pp. 2-3).

91. From 1970 to 1974, Ostlund was an announcer at Station KCEY in Turlock, California. In addition, in 1973, he became a salesperson and Music Director. In 1974, he became a salesperson at KYNO-FM in Fresno. From 1975 to 1976, he was a salesperson at KFYE-FM in Fresno (Ostlund Ex. 1, p. 3).

**Auxiliary Power**

92. Ostlund will install and maintain an emergency backup generator at his transmitter site so that broadcast service can be continued in the event of a power outage (Ostlund Ex. 1, p. 6).

**Valley Radio Ltd., A California Limited Partnership (Valley)**

93. Valley is a limited partnership formed under California law. William B. Roth, the sole general partner, owns fifteen percent of the equity. McFadden Communications Corporation is the sole limited partner (Valley Ex. 1, p. 1).

**Diversification**

94. Roth owns five percent of KLIO(FM), Davenport, Iowa. He is also the station's Vice President and General Manager. He will resign this position if Valley's application is granted (Valley Ex. 2).

**Integration**

95. If Valley's application is granted, Roth will work at least forty hours a week as the General Manager of its station. He will oversee and be solely responsible for all aspects of station operations (Valley Ex. 1, p. 1). Valley only seeks fifteen percent integration credit for Roth's proposal (Tr. 130-131).

96. Roth will move to Fresno if Valley's application is granted (Valley Ex. 1, p. 1).

97. Roth has held the following positions at broadcast stations or companies:

| Dates | Position | Station/Corporation |
|---|---|---|
| 9/86-Present | General Manager | KLIO(FM), Davenport, Iowa |
| 3/85-8/86 | Operations Manager | WMJC(FM)/ WHND(AM), Detroit, Michigan |
| 3/83-3/85 | Station Manager | KIOA(AM)/KMGK(FM), Des Moines, Iowa |
| 10/81-2/83 | General Manager | WLLF(AM), Mobile, Alabama |
| 1/79-9/82 | National Program Director | Capitol Broadcasting Corp. |
| 1977-1979 | Operations/Program Director | WKSJ AM-FM, Mobile, Alabama |
| 1969-1977 | Program Director | WEEX/WQQQ, Allentown/ Bethlehem/Easton, Pennsylvania |
| 1968-1969 | Air Talent/ Producer | WIOO, Carlisle, Pennsylvania |
| 1966-1967 | Air Talent/ Producer | WHYL AM-FM, Carlisle, Pennsylvania |

(Valley Ex. 1, pp. 1-2).

**Auxiliary Power**

98. Valley will install auxiliary power facilities (Valley Ex. 3).

**Laura H. Norman (Norman)**

99. Laura H. Norman is an individual applicant (Norman Ex. 1).

**Diversification**

100. Ms. Norman owns 12 shares of the common stock of MCA, Inc., which accounts for substantially less than one percent of all the issued and outstanding common stock of MCA, Inc. Ms. Norman has committed to divest herself of her stock in MCA, Inc., prior to the commencement of program tests of her proposed Fresno FM station, if she is awarded the construction permit. Ms. Norman has no other interest in any medium of mass communication (Norman Ex. 2).

**Integration**

101. Ms. Norman has committed to work full-time (at least 40 hours per week) at her proposed FM station as the station's general manager. As general manager, Ms. Norman will be responsible for overseeing the construction and operation of the station and will have ultimate responsibility for all decisions affecting the operation of the station. Ms. Norman testified she will hire department heads and coordinate their efforts to ensure that the station operates efficiently, is responsive to community programming needs and interests, and is in compliance with the Commission's rules. Ms. Norman also will oversee the hiring of other key station personnel. Sales, programming, engineering, public affairs and news department heads (to the extent that they are hired) are to report directly to Ms. Norman. As general manager, Ms. Norman will act as the station's primary representative to the Fresno community. In addition, Ms. Norman will be responsible for administration of the station's equal employment opportunity program (Norman Ex. 1, pp. 1-2). If Ms. Norman's application is granted, she intends to withdraw fully from all employment or business pursuits which require her time and attention. *Id.*

102. Ms. Norman has resided in Fresno since the Fall of 1978, with the exception of the period from May to August 1980, when she temporarily resided in Sacramento, California, and the period August 1980 to January 1981, when she temporarily resided in Bakersfield, California (Norman Ex. 1, p. 2; Tr. 733-734). On her resume prepared after graduation from college, Ms. Norman listed Yosemite National Park as her permanent address in 1982 (Tr. 741-742). She testified, however, she actually was living in Fresno and only listed Yosemite on her resume because she thought it would make it more interesting and help her to get a job (Tr. 894-895).

103. With respect to civic and community involvement, Ms. Norman is a volunteer with the 4-H Clubs in the Fresno area and with the Future Farmers of America (FFA). Ms. Norman states she has been involved in helping children who are members of the 4-H Clubs and the FFA learning techniques for judging livestock and horses (Norman Ex. 1, p. 3). Ms. Norman is not affiliated with any specific chapter of the 4-H. The FFA chapter with which she has had the most involvement is in Albury, California, which is located outside the proposed service area (Tr. 850). For the past two years, Ms. Norman has spent no more than five weekends per year on her 4-H, FFA and related activities (Tr. 848-851). Of those five weekends, probably three are attributed to the 4-H and FFA activities themselves, while the two other weekends are limited to judging horses, an activity for which she is paid (Tr. 848, 863). In the springs of 1983 and 1984 Ms. Norman served as a judging official of FFA Field Day Horse Shows. Each event took one day (Tr. 879-880).

104. While attending California State University at Fresno, Ms. Norman majored in agriculture and minored in radio-television broadcasting. In her written direct case, Ms. Norman stated she worked at Station KFSR(FM), Fresno, California, as a copy writer and announcer, and also served as a copy writer for news at Station KSEE(TV), Channel 24, Fresno, California (Norman Ex. 1, pp. 2-3; Tr. 902). KFSR(FM) is located on the campus of California State University and is for use by the broadcasting school (Tr. 853-854). Ms. Norman's work at KFSR(FM) was in connection with her college course work and occurred while she was working on her minor from about Fall 1980 through the Summer of 1982 (Tr. 859). When she was a copywriter at KSEE-TV, Ms. Norman was trying to set up an internship with the station in order to obtain work experience. She was not successful in establishing an internship. Her work at the station was during course work and lasted only for a few weeks (Tr. 855-858). The news copy Ms. Norman wrote was not used on the air (Tr. 855-857).

**Auxiliary *Power***

105. Ms. Norman will install and maintain auxiliary power generating facilities at her main studio location and transmitter site (Norman Ex. 3).

## CONCLUSIONS

**Qualification Issues - JMH**
**Unauthorized Transfer of Control**

106. The record evidence establishes that John Hooker, licensee of station KEAP(AM) transferred operating control of the station to Fresno Hispanic Radio, Inc. (Fresno Hispanic) and its successor, San Joaquin Valley Hispanic Radio, Inc. (San Joaquin) without Commission consent in violation of Section 310(b) of the Act. The unauthorized transfer of control was accomplished under the guise of a time brokerage contract which was, in reality, a lease of the station facilities. The agreement first executed in 1984 and in effect in 1988 differed from the typical brokerage contract in two significant respects. First, it involved a sale of virtually all of KEAP's broadcast time, i.e., Monday to Saturday - 6:00 a.m. to sign-off and Sunday - 3:00 p.m. to sign-off (JMH Ex. 6-A). Second, almost the entire broadcast week was sold to a single entity, Fresno Hispanic and its successor, San Joaquin.

107. There are a number of other factors which belie the notion of a permissible time brokerage arrangement and establish, instead, a de-facto transfer of control. Operation of the station rests in the hands of San Joaquin. Only three part-time employees work for KEAP: Hooker, his daughter and one Sunday disc jockey. Significantly, no HBC employee is physically present at KEAP for most of the broadcast week. HBC employs no secretary, traffic manager, program director or sales manager. By contrast, San Joaquin employs ten full-time employees and four part-time employees. San Joaquin's staff includes a general manager/business manager, program director, sales manager, receptionist/traffic manager, a salesperson and an announcer. Hooker claimed an inherent right to fire any San Joaquin employee, but no provision of the time brokerage contract or any other agreement gives him that right. It goes without saying that HBC never fired a San Joaquin employee.

108. Additional evidence of Hooker's *de facto* abdication of control is manifested by Hooker's surrender of control of programming of KEAP. The record establishes that the licensee of KEAP(AM) -- HBC Broadcasters -- has, over the past several years, presented on its own absolutely no public affairs programming, nor any news programming, nor any political broadcasting programming. Under the time brokerage contract, HBC purportedly reserves the right to determine, select, supervise and control program content (JMH Ex. 6-A, p. 1). HBC has never exercised any such right. The record makes clear that the reservation of rights specified in the brokerage contract is a subterfuge intended to conceal the true nature of HBC's lease arrangement with San Joaquin. San Joaquin determines the format, content, scheduling and topics of programs including the guests and topics on KEAP's public affairs programs. Moreover, the quarterly issues/programs lists required under Section 73.3526(a)(9) of the Commission's Rules have not been compiled by HBC. In this connection, the lists (compiled by a foreign-language time broker on KEAP) violate Section 73.3526(a)(9) of the Commission's Rules since, according to Hooker's own testimony, the lists for KEAP(AM) have only contained, at most, a listing of issues or programs (which the licensee itself had not compiled), and which did not contain any other notations, including, specifically, a listing of issue-responsive programming, as specifically required by the Commission's Rules. *See Deregulation of Radio*, 84 FCC 2d 968, 49 RR 2d 1 (1981), *recon. granted in part*, 87 FCC 2d 797, 50 RR 2d 93 (1981), *aff'd in part and remanded sub nom., Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). *See also Report and Statement of Policy Regarding Commission En Banc Programming Inquiry*, 44 FCC 2303, 2314 (1960).

109. The record makes abundantly clear that Hooker has no idea what is being broadcast over KEAP. It is also painfully obvious that Hooker could care less. Hooker's only interest is in collecting rent from San Joaquin for its lease of the station. His purposted reliance upon monitoring by Dick Delgado, if anything, demonstrates his lack of candor. For example, in written testimony, Hooker claimed he has "retained" Dick Delgado since 1973 to monitor the Spanish language programming on KEAP. In fact, Delgado was never retained. He has never been an employee of HBC nor has he received any compensation. At least prior to May 1988, his monitoring, if any, was done as a favor. Delgado's reports regarding Spanish language programming on the station provides little meaningful information and is more a product of happenstance than established procedure. Most significantly, Hooker has never taken any action in response to Delgado's reports.

110. San Joaquin's obligation to pay all of the station's operating expenses is further evidence of its control over KEAP. San Joaquin has paid more than every day operating expenses, however. It built offices at the station for its staff at its own expense. It pays real estate taxes on Hooker's building and carries liability and libel insurance. Hooker is clearly interested in getting the money that San Joaquin owes him under the lease arrangement, but that is his only financial interest in KEAP's operation.

111. San Joaquin has acted as if it is in full control of KEAP. It entered into two network affiliation agreements that listed it as the licensee of KEAP. San Joaquin's general manager filed an annual employment report with the Commission listing both San Joaquin and HBC employees. HBC, on the other hand, did not file an ownership report or an employment report for 1987.[14]

112. Mrs. Sonder, a director of Carta, has alleged that San Joaquin's representative told her that Hooker has no control over the station. San Joaquin principal, DeAlba, denies that accusation and gives a different account of their May 1988 meeting. Mrs. Sonder's account of the meeting will be credited for several reasons. First, the record shows that Hooker has exercised no control over KEAP's affairs. More importantly, DeAlba was not a credible witness. For example, he repeatedly claimed that San Joaquin had provided Hooker with monthly affidavits certifying compliance with the Commission's Rules, but Hooker specifically denied receiving such affidavits. Also, DeAlba claimed in his direct testimony that Bernal spoke in Spanish and his comments were translated to Dr. Sonder in English. However, at hearing, DeAlba, under cross examination, testified that Bernal presented the proposal in English (Tr. 1615). Even assuming the absence of an admission by DeAlba as to Hooker's abdication of control, the actions of Hooker and San Joaquin fully detailed in the record demonstrate that to be the case. Moreover, it is undisputed that the purpose of the May 1988 meeting was to discuss a joint sales effort between San Joaquin and Station KXEX(AM), Fresno. Hooker's willingness to allow San Joaquin's principals to negotiate such an arrangement provides further evidence of Hooker's abandonment and San Joaquin's assumption of control over KEAP's operation.

113. Another factor of some significance is Hooker's option agreement with San Joaquin. Under the agreement executed in 1985, San Joaquin was given the option to purchase 15% of HBC's stock at the end of any annual term of the Time Brokerage Contract. If San Joaquin had remained current in its payments to HBC, it would have had the right to buy all of HBC's stock in 1991. Hooker is still willing to sell stock to San Joaquin, and he expressed a desire to sell the station. In fact, Hooker and his daughter have established a trust account to satisfy the IRS that parts of the money received from San Joaquin were for the purchase of stock. A licensee's continued willingness to "trade control of cash" is relevant to determining whether a transfer of control has taken place. *Stereo Broadcasters, Inc.* 87 FCC 2d 87, 93 (1981).

114. In sum, the record evidence establishes beyond any doubt that HBC has leased the station to San Joaquin. San Joaquin programs the station the entire broadcast week, the only exception being the 15 minutes retained by Hooker on Sunday morning and the limited English speaking brokered programs. San Joaquin's staff operates the station on its own without any supervision by HBC. In fact, Hooker and his daughter are only present part of weekday mornings. Their visits to the station are not to supervise the station. Rather, their concerns are those typically associated with a landlord-tenant relationship, namely, collecting the rent. It is also noteworthy that, in this case, the tenant-lessee pays KEAP's operating expenses including insurance and real estate taxes. These circumstances leave no doubt that HBC transferred control of KEAP(AM) to San Joaquin. *See Stereo Broadcasters, supra.*

115. Despite the Commission's liberalization of its policies on time brokerage, in its 1980 *Policy Statement On Time Brokerage Arrangements*, 48 RR 2d 763 (1980), the Commission reaffirmed the continuing applicability

and validity of its longstanding policy that licensees of broadcast stations are expected to retain control over, and responsibility for, all broadcast programming on their stations. *Id.* at 768. HBC's turning over of the KEAP(AM) keys to San Joaquin runs counter to the Commission's admonition and warrants the conclusion that JMH lacks the requisite qualifications to be a Commission licensee.

116. The alien ownership issue must also be resolved adversely to JMH. Section 310(b)(3) of the Communications Act, 47 U.S.C. Sec. 310(b)(3), prohibits a corporation from holding a license if any officer or director is an alien or more than one-fifth of the stock is held by aliens. Bernal, who owns thirty percent of San Joaquin's stock, is a Mexican citizen. Since San Joaquin is the *de facto* licensee of KEAP, Bernal's ownership interest violates Section 310(b)(3). Moreover, the option agreement - both with regard to the original brokers and San Joaquin - would have given aliens an iliegal ownership interest in KEAP.

117. The lack of candor issue must also be resolved adversely to JMH. While HBC filed the time brokerage contract and certain other documents with the Commission, these documents did not disclose the true extent of San Joaquin's control over KEAP's operations. Indeed, the time brokerage contract paints a misleading picture because it purports to give Hooker several rights that he has never attempted to exercise. Lack of candor is a deceitful concealment, evasion or other failure to provide full information. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (1983). The full story behind San Joaquin's operation of KEAP was obviously material information that Hooker had a clear motive to conceal. Under those circumstances, Hooker's failure to provide further information regarding San Joaquin's control over KEAP is a disqualifying lack of candor.

118. Moreover, Hooker also affirmatively misrepresented the amount of time he devoted to the station's affairs. He specifically claimed that he devoted an average of ten hours a week at the station and in additional ten hours a week outside the station conducting station business. In fact, the total time he devoted to station business is less than ten hours. Hooker had a clear motive to overstate the time he devoted to station affairs in light of questions regarding his control of the station and his claim to a daytimer preference (see *infra*). His total estimate of at least twenty hours cannot be considered a mere miscalculation because the true figure is around six hours. His statement is thus a false statement of fact made with an intent to deceive the Commission. *Fox River Broadcasting, Inc., supra*. Accordingly, JMH is not qualified to become a Commission licensee.

## COMPARATIVE ISSUE

### Diversification

119. Carta and Norman have no attributable media interests. Carta's John Sonder, together with his wife, are sole stockholders of the licensee of Station KXEX(AM), Fresno, California. However, they have timely pledged to divest themselves of KXEX upon grant of Carta's application. In addition, Ms. Norman's holding of an insignificant number of shares of MCA, a publicly traded corporation which is also a broadcast licensee, does not justify a diversification demerit. Valley's assertion that Ms. Norman should be charged with the media interests of her father is without basis and is rejected. Also, Fresno FM receives no diversification demerit. One of Fresno FM's limited partners hold media interests. However, the media interests of *bona fide* limited partners are not cognizable under the diversification criterion. *Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934-935 (1986). Valley's general partner, William Roth, holds a 5% interest in a Davenport, Iowa radio station. Because of distance and slight degree of ownership, Roth's interest is *de minimis* and warrants no demerit.

120. John Hooker, the applicant in this case, holds a 90% interest in HBC, the licensee of daytime station KEAP-AM, Fresno. JMH seeks to avoid a diversification demerit through Hooker's divestiture pledge. However, that pledge cannot be credited. Hooker pledged he would divest his commitment in KEAP "within the period permitted by the Commission." The pledge is meaningless since the Commission's rules do not bar Hooker's retention of his interest in KEAP even if he were to be awarded the FM construction permit. An FM applicant's pledge to divest a co-owned AM station is a voluntary act intended to improve the applicant's comparative posture. Hooker's failure to unequivocally commit to divest his interest within a specific time frame requires consideration of his media interest. Hooker's attempt to clarify his intent at hearing constitutes an impermissible comparative upgrade and can not be allowed. JMH receives a substantial diversification demerit for Hooker's 90% media interest in the proposed community of license.

121. John Ostlund is, and intends to remain, sole owner of one of the larger advertising agencies in the Fresno market. Ostlund's agency places advertising on local broadcast stations. In the six months prior to the hearing, Ostlund's agency had placed advertising on no less than seven Fresno-market FM stations and two Fresno AM stations. Commission precedent holds that common ownership of a broadcast station and an advertising agency which places spots on stations serving the same area is relevant to the Commission's diversification objectives. *Jarad Broadcasting Co.*, 61 RR 2d 389, 408, 410 n. 11 (Rev. Bd. 1986) (slight demerit assessed), *recon. denied*, 1 FCC Rcd 1267 (Rev. Bd. 1986), *rev. denied in all material respects*, 2 FCC Rcd. 6080 (1987); *Mid - Florida Television Corp.*, 69 FCC 2d 607, 649, 43 RR 2d 811, 856 (Rev. Bd. 1978) (minor demerit assessed) (subsequent history omitted); *see Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1498-1499, 45 RR 2d 1, 10 (Rev. Bd. 1979), *rev. denied*, FCC 79-397 (released June 21, 1979); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 15 (Rev. Bd. 1978). Here, the media-placement functions of Ostlund's agency involve both the Fresno market itself and a not insignificant amount of money. Under *Jarad* and *Mid - Florida*, Ostlund is assessed a slight diversification demerit.

### Integration

122. Carta receives 100% quantitative integration credit for the proposed participation of John Sonder as its full-time general manager. Opposing parties urge that Sonder's integration credit should be reduced because Sonder's wife and daughter are proposed as officers and directors of Carta. The argument is without merit and is rejected. The parties overlook the fact that Sonders owns all of Carta's issued and outstanding stock and, thus, controls the corporation. The board of directors serves at Sonder's pleasure and its members can be dismissed summarily simply by his calling a stockholder's meeting and

electing new directors. Because control of a corporation ultimately rests with its voting stockholders, the Commission consistently has held that the integration credit to be awarded a stock corporation is measured on the basis of the stockholder's participation in management, not the board of directors. *See Veterans Broadcasting Company, Inc.*, 38 FCC 25, 43 (1965). It is also urged that because California is a "community property state," Sonder's spouse must be construed to be a 50% owner of Carta. The contention is rejected. No cases have been cited in support of this contention. Moreover, it is clear that the strictures of state law are not controlling in the assessment of integration proposals. *See Mark L. Wodlinger*, 64 RR 2d 1645, 1648 (Rev. Bd. 1988). Sonder, the sole stockholder, will operate the proposed station. The fact that his spouse, as a matter of state law, holds a community property interest is irrelevant.[15] Sonder's integration is qualitatively enhanced by 33 years residence in Fresno, his Fresno civic activities and 35 years' broadcast experience.

123. Fresno FM receives 100% integration credit for Jesus Cruz's proposal to become the general manager of the station. Several applicants contend that Fresno FM cannot receive 100% integration credit because its limited partnership structure is purportedly a "sham." The contention is without basis and is rejected. The contention appears to principally rest on limited partner Stanfield's role in the formation of the applicant. However, a limited partner's participation in forming an applicant does not establish that the limited partners will control the applicant's station. *Victory Media, Inc.*, 3 FCC Rcd. 2073, 2074 (1968). Significantly, no evidence exists that Fresno FM's limited partners controlled, let alone, participated in the preparation or prosecution of the application. On the contrary, only Cruz and the applicant's counsel have been involved in the preparation and prosecution of the application. Similarly, there is no evidence that the limited partners' passive role will change if the application is granted. Fresno FM's competitors also point out that Cruz is not required to contribute money to the partnership. Financial contributions, by integrated principals, however, are not prerequisites for integration credit. *Doylan Forney*, 3 FCC Rcd. 6330, 6337 (Rev. Bd. 1988); *KIST Corp.*, 102 FCC 2d 288 (1985). In this connection, Cruz's 15% ownership interest for services appears to be justified. Unlike the typical case where the general partner serving as general manager has no broadcast experience, Cruz has 10 years broadcast experience including management positions.

124. Ostlund argues that various sections of Fresno FM's partnership agreement prevent the partnership from receiving full integration credit. First, he claims it is improper that the limited partners can vote to remove the general partner if bankruptcy proceedings are instituted against the general partner. The Commission, however, allows limited partners to vote to remove general partners, that are "subject to bankruptcy proceedings." *Ownership Attribution*, 58 RR 2d 604, 619-620 (1985). Contrary to Ostlund's claim, the Commission did not limit this right to bankruptcy proceedings initiated voluntarily by the general partner. Ostlund's presumption that the limited partners would remove Cruz by filing a specious petition for bankruptcy is without basis. Furthermore, his argument that Fresno FM will inevitably become bankrupt is rank speculation based upon an erroneous premise. The limited partners have agreed to finance the first ninety days of station operations (Tr. 327). Also, Ostlund offers no evidence that the partnership could not borrow operating capital. Ostlund's second claim is that any two limited partners can dissolve the partnership without Cruz's consent. This claim is directly contrary to Paragraph 6 of the partnership agreement, which requires the general partner's consent for dissolution (Fresno FM Ex. 1, p. 2; Tr. 460-461, 578-579). Finally, Ostlund argues that the permanency of Cruz's integration proposal is in question because the partnership term currently expires in 1996. No applicable precedent for this argument is cited. Moreover, he has not shown that the partners will not extend the partnership term beyond 1996 if it receives a license for the proposed station.

125. None of the cases relied upon by Fresno FM's competitors support their arguments that Fresno FM is a sham. In *Magadalene Gunden Partnership*, FCC 88-387 (released December 13, 1988), a case cited by Valley and Norman, the critical fact was that the limited partner had provided legal services to the applicant. No limited partner of Fresno FM has provided legal services to the partnership. Furthermore, the limited partner in *Gunden* hired counsel and engineers, directed counsel to obtain a bank letter from a specific bank, and obtained a transmitter site for the applicant's use. *Magadelene Gunden Partnership*, 2 FCC Rcd. 5513, 5515-5516, 63 RR 2d 1647, 1652-1653 (Rev. Bd. 1988). Thus, unlike here, the limited partner did more than organize the partnership and provide money. Furthermore, unlike Cruz, the general partners in *Gunden* had no broadcasting experience. 2 FCC Rcd. at 5516, 62 RR 2d at 1653. Similarly, in *Doylan Forney, supra*, 3 FCC Rcd at 6332, 65 RR 2d at 829-830 (Rev. Bd. 1988), *modifying* 2 FCC Rcd. 6935, 6946 (ALJ 1987), the Board affirmed the reduction of integration credit solely on the basis that limited partners were acting as the applicant's counsel. Furthermore, that applicant's general partner exhibited a degree of confusion and ignorance not shared by Cruz. *Religious Broadcasting Network*, 2 FCC Rcd. 6561, 6566-6567 (ALJ 1987), *affirmed* 3 FCC Rcd. 4085, 4090, 65 RR 2d 56, 67-69 (Rev. Bd. 1988), a case cited by Norman, involved a "consultant" who dominated virtually every aspect of prosecuting the application in question. This "consultant" selected and communicated with the applicant's counsel and engineer, kept the applicant's books and records, maintained the checkbook, and maintained the partnership's principal place of business at his office. Fresno FM bears no relationship to this applicant. *Payne Communications, Inc.*, 1 FCC Rcd. 1052, 1058-1060, 61 RR 2d 1323, 1338 (Rev. Bd. 1986) involved general partners who followed the limited partner's "advice" regarding virtually every aspect of prosecuting their application. Here, after Cruz agreed to become general partner, he has neither sought nor received advice from the limited partners regarding the preparation and prosecution of Fresno FM's application. Finally, *Louisiana Super Communications Limited Partnership*, 102 FCC 2d 1293, 1299-1300, 59 RR 1d 761, 766 (Rev. Bd. 1985) supports the claimed *bona fides* of Fresno FM's limited partnership structure. In that case, the Board awarded 100 percent integration credit to an applicant whose limited partner recruited other partners, helped prepare the application, and obtained the necessary financial commitments. The activity of the limited partner in that case was greater than Stanfield's role in Fresno FM's affairs. Nonetheless, the Board held that the "limited partners have functioned in a manner

commensurate with the roles normally associated with limited partnerships." A similar conclusion is required here. [16]

126. Cruz's integration proposal is substantially enhanced by his Hispanic status. Fresno FM also is entitled to enhancement for Cruz's previous 6 year residence in Fresno and his promise to move back there. Also, Fresno FM receives credit for Cruz's civic involvement and broadcast experience.

127. Hooker seeks 100% quantitative integration credit claiming he will work at least forty hours a week as the General Manager of the proposed station. No integration credit will be awarded. As discussed, *supra*, Hooker misrepresented the amount of time he devotes to KEAP's affairs. His claim that he was substantially involved in the day-to-day management of KEAP between 1984 and 1988 was false. Hooker claimed that he had been involved 25-30 hour per week in managing KEAP. However, Hooker could account for no more than 6 3/4 hours per week, most of which appears to have been spent on Hooker's personal affairs, rather than station business. In light of Hooker's unwillingness to be truthful and forthcoming concerning the time spent in connection with KEAP, his pledge to work full-time at the proposed FM station is not worthy of belief and is rejected. Moreover, even if it is assumed that Hooker will devote some time to station affairs, it cannot be found that he will be involved in the station's day-to-day management. His involvement in KEAP's affairs is the antithesis of the day-to-day involvement in station management required for integration credit. Thus, even assuming JMH sole proprietor John Hooker was found basically qualified, his past conduct with respect to the operation of Station KEAP completely undermines any reliance on his integration pledge.

128. Even if it could be found that Hooker would effectuate his integration proposal as promised, his unusually poor broadcast record would negate the value of his integration proposal.[17] An applicant's broadcast related misconduct can eliminate the presumed benefits of a principal's integration into station management. In *East St. Louis Broadcasting*, 29 FCC 2d 170, 172-173 (1971), the Commission assessed a substantial demerit for a principal's integration proposal because of that principal's unusually poor broadcast record. Hooker's dereliction is far more egregious than that found in *East St. Louis*.[18] Hooker's unusually poor broadcast record provides little assurance that the objectives underlying the integration criterion would be achieved. Accordingly, no quantitative integration credit is awarded to JMH. [19]

129. Ostlund receives 100% integration credit for his proposal to serve as General Manager of the subject station. Norman, Carta and Valley urge that Ostlund's intention to work 40 hours per week at the proposed station is not credible because Ostlund will retain ownership of his agency. Their contention is rejected. Ostlund has pledged to assign his current day-to-day responsibilities to his experienced employees at the agency and to reduce his involvement to no more than five hours per week. Moreover, Ostlund has shown in convincing detail that he can reduce his time commitment to Jeffrey-Scott so that it will not interfere with his ability to meet his commitment to manage his station on a full-time basis. In the absence of evidence impeaching his express representations, Ostlund must be accorded credit for his integration proposal. *Central Texas Broadcasting Co., Ltd.*, 51 RR 2d 1478 (1982). Ostlund's integration credit is enhanced by 14 years residence in Fresno and Fresno County, past civic participation and broadcast experience.

130. Valley receives fifteen percent integration credit for William B. Roth's proposal to become the General Manager of its proposed station. The integration proposal is slightly enhanced by his broadcast experience and minimally enhanced by his proposal to move to Fresno.

131. Ms. Norman receivs 100% integration credit for her proposal to work as full-time General Manager of the station. The argument that Ms. Norman's credit should be reduced to 50% because of her husband's community property interest has been previously considered and rejected. Valley's argument that Ms. Norman should not be given integration credit because her father is the alleged real party-in-interest is also rejected. Valley has submitted no evidence in support of its contention. The fact that Ms. Norman is borrowing from her father the funds to implement her proposal does not support Valley's contention. There is no FCC policy barring parents from giving their children financial support to apply for and operate radio stations. *See Tuscarawas Broadcasting Co.*, 4 FCC 2d 466 (Rev. Bd. 1966). A family member who finances an application does not become a real party-in-interest in the application unless that person's intent to exercise control over operations of the proposed facility is demonstrated. *Virginia Communications, Inc.*, 2 FCC Rcd. 1895 (1985). The record makes clear that Ms. Norman was the sole and dominating force behind the application and her father had no role other than a funding source (Tr. 887-890). Ms. Norman receives female enhancement credit, credit for local residence from the Fall of 1978 with the exception of 8 months, and very slight civic participation credit. Ms. Norman's work in broadcasting while in college is too insignificant to be credited.

132. *Participation Summary*. JMH receives no integration credit and Valley receives 15% quantitative credit. The remaining four applicants receive 100% integration credit. With respect to these applicants, the award of an integration preference turns on their relative qualitative attributes. Fresno FM's integration proposal warrants a preference over Carta, its closest competitor. Fresno FM is the only applicant entitled to a minority enhancement preference. While Ms. Norman is entitled to a female preference, that preference is less significant than a minority preference. *Mid - Florida Television Corporation*, 69 FCC 2d 607, 652 (Rev. Bd. 1978); *set aside on other grounds*, 87 FCC 2d 203 (1981); *accord*, *Radio Gaithersburg*, 72 FCC 2d 821, 829 (Rev. Bd. 1979). Long-term local residence and minority integration preference have equal comparative significance. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985). Carta principal, Sonder, has lived in Fresno since 1955 and his long-term local residence offsets Fresno FM's minority integration preference. However, Fresno FM is entitled to slight to moderate local residence credit since Cruz lived in Fresno from 1976 to 1982 and intends to move back there if Fresno FM's application is granted. Also, Fresno FM receives a civic participation enhancement preference. Cruz's civic participation has been more extensive and varied than that of Sonder. Also, much of Sonder's activities have less significance since they occurred in the distant past (some 20-25 years before the filing of the application). Although Sonder's broadcast experience is longer in duration, Cruz's record which includes management experience is substantial. Sonder receives a broad-

cast experience preference. However, broadcast experience merits only slight credit. *Policy Statement On Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). In sum, Fresno FM's credit for local residence and its civic participation preference outweigh Carta's broadcast experience preference tipping the scales to Fresno FM. As between Fresno FM and Ostlund, Cruz's minority preference and Ostlund's long-term local residence balance out. However, Fresno FM's residence credit and civic participation and broadcast experience give the advantage to Fresno FM. Finally, as between Fresno FM and Norman, Ms. Norman's local residence of less than ten years, which warrants only moderate credit, does not offset Fresno FM's substantial minority enhancement credit. In addition, Fresno FM also receives local residence credit and civic participation and broadcast experience preferences. Ms. Norman's female enhancement credit and her enhancement credit for local residence and civic participation are clearly inferior to the enhancement credit awarded to Fresno FM.

## COMPARATIVE SUMMARY

133. Fresno FM suffers no diversification demerit and its integration proposal is superior to that of the other applicants. Further, since all applicants propose auxiliary power, that factor is of no consequence. Fresno FM's application will be granted.

Accordingly, IT IS ORDERED, That the "Brief In Support Of Threshold Showing Regarding Unusually Poor Past Broadcast Record" filed December 15, 1989 by Laura H. Norman and Carta Corporation, and "Reply Brief In Opposition To Threshold Showing Re Past Broadcast Record" filed December 28, 1989 by John Marshall Hooker d/b/a JMH Broadcasting ARE DISMISSED.

IT IS FURTHER ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[20] the application of Fresno FM Limited Partnership for a construction permit for a new FM station on Channel 257A in Fresno, California IS GRANTED; and the applications of Carta Corporation, John Marshall Hooker d/b/a JMH Broadcasting, John Edward Ostlund, Valley Radio Ltd., A California Limited Partnership, and Laura H. Norman ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

## FOOTNOTES

[1] In caption order, the eight other parties who filed applications but are no longer participants in this case are as follows: Dennis R. Brostram; Wayne P. Decker; California Broadcasting Company, Inc.; Community First Broadcasters of Fresno; Fresno FM Partnership, Ltd.; Valley FM Broadcasters; Paul Bowman and Company, Inc.; and Robert Michael Mason, William Owen Mason & Laura Sue Mock d/b/a 3M Broadcasting.

[2] The above issues were specified by *Memorandum Opinion and Order*, FCC 88M-2940 (released September 12, 1988).

[3] Paragraph 14 of the HDO authorized a comparison of the applicant's coverage proposals, but the parties have stipulated that no significant difference in their coverage proposals exists (Joint Ex. 1).

[4] Stanfield also contacted Pat Wardlow, owner at the time of a station in Santa Barbara, apparently, without success (Tr. 527-528).

[5] The Partnership Agreement provides that the General Manager of the station shall be compensated with "the salary and benefits generally paid to such persons holding similarly situated positions" (Fresno FM Ex. 1, p. 6). Cruz believed that $6,000 a month was the market salary for general managers and listed that amount in the operational budget which he prepared (Tr. 217-219, 226).

[6] Certain portions of the findings under the qualifications issues, *discussed, infra*, specified against JMH are also applicable here.

[7] KEAP-AM currently operates with reduced power (48 watts) after local sunset (Tr. 588-589); (JMH Ex. 2, p. 3).

[8] Ms. Hooker works at KEAP(AM) Monday to Friday from approximately 8-9 in the morning until 12 or 1 PM in the afternoon. No employee of the licensee is present in the afternoon or evening, Monday through Friday or on the weekend with the exception of part of Sunday morning when a disc jockey employed, by the station is present (Tr. 593). Ms. Hooker's duties as general manager consist mainly of bookkeeping functions in connection with the station time brokerage contracts (Tr. 594-599).

[9] The "Time Brokerage Contract" specifies that the broker time segments were Monday to Saturday - 6:00 a.m. to sign-off and Sunday - 3:00 p.m. to sign- off (JMH Ex. 6-A).

[10] Occasionally, Delgado himself broadcasts material on KEAP in Spanish. No one spot-checks Delgado (Tr. 1377-1379).

[11] By teaser spot, Hooker means "if there is a new store that's going to be opening within our area, no spot can run saying, it's coming, it's coming, without an identification" (Tr. 1246-1247).

[12] JMH proffered written testimony from Messrs. Bernal, Rodriguez and Rabago, but declined to make them available in Washington for cross- examination. Accordingly their testimony was rejected.

[13] Bernal, it is noted, was said to have spoken English at other business meetings that were referred to during the hearing. For example, in the negotiations leading to the second amendment to the time brokerage agreement, Bernal spoke English, according to DeAlba (Tr. 1587). For another example, in a meeting with Hooker a few weeks before the hearing, Bernal spoke English and even translated some other person's Spanish comments to English (Tr. 1073).

[14] HBC's failure to file a 1987 ownership report and employment report for KEAP violates Section 73.3615 and 73.3612 of the Rules, respectively.

[15] As noted by Carta in its Reply, its opponents side-step the import of Section 51.25(d) of the California Civil Code, which provides that a spouse who is operating or managing a business construed to be community property is deemed to have "primary management and control" of the busines including the right to act alone in all transactions.

[16] The parties also appear to urge that Cruz's performance as a witness raises questions as to the credibility of his integration proposal. However, the Presiding Judge finds Cruz to be a credible witness and finds nothing in his testimony which suggests that he will not fulfill his integration proposal.

[17] Following the conclusion of the hearing, Norman and Carta filed a "Brief In Support Of Threshold Showing Regarding Unusually Poor Past Broadcast Record." JMH filed a Reply urging that a threshold showing had not been made justifying consideration of Hooker's past broadcast record. Consideration of the Brief and Reply are not necessary. The record compiled in this proceeding showing Hooker's abdication of control of Station KEAP(AM), requires consideration of the licensee's past performance in evaluating Hooker's integration pledge. *East St. Louis Broadcasting*, 29 FCC 2d 170 (1971).

[18] In *East St. Louis*, the principal broadcast an intemperate attack on competitor stations, issued harassing and irresponsible memoranda to employees and sanctioned double billing. *East St. Louis Broadcasting Co., Inc.*, 19 FCC 2d 289, 294 (Rev. Bd. 1969).

[19] Assuming, *arguendo*, integration credit was awarded, Hooker would receive substantial local residence credit, very slight civic participation credit and credit for broadcast experience. Hooker is not entitled to an AM daytimer's preference since he has not satisfied the threshold criteria. Hooker did not devote the required 20 hours a week to station affairs during the three years before he filed his application. In addition, the licensee of the AM station (HBC) did not apply for the FM channel. FM *Channel Assignments (Increased Availability)*, 59 RR 2d 1221, 1229 (1986).

[20] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-407**

In re Applications of

| | |
|---|---|
| RICHARDSON BROADCASTING GROUP | File No. BPH-870824MG |
| ELIZABETH M. YOUNTS | File No. BPH-870824MH |
| GREENE BROADCASTING, INC. | File No. BPH-870824MI |

For Construction Permit for a
New FM Station, Channel 273A
Southern Pines, North Carolina

**APPEARANCES**

*Rachel O. Davis* and *Denise B. Moline* on behalf of Richardson Broadcast Group;[1] *David D. Oxenford* and *John K. Hane* on behalf of Elizabeth S. Younts; *Mark J. Prak* and *Daniel W. Clark* on behalf of Greene Broadcasting, Inc.; and *Gary P. Schonman* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER**

**Issued: November 2, 1989; Released: November 9, 1989**

1. Three mutually-exclusive applicants are vying for a construction permit for a new FM station on Channel 273A at Southern Pines, North Carolina. They are the Richardson Broadcast Group (RBG); Elizabeth M. Younts (Younts); and Greene Broadcasting Inc. (Greene or GBI).

2. After the interlocutory cycle had run its course, and a faltering application had been dismissed,[2] evidence was adduced on only one factual issue, the standard comparative issue. So the issues that need to be decided are (53 F.R. 37870 published September 28, 1988): [3]

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in the light of the evidence adduced pursuant to the foregoing issue[s], which of the applications should be granted, if any.

3. However, in addition to the usual standard comparative factors (diversification and best practicable service) two other criterion need to be evaluated. The Chief, Audio Services Division called for comparative coverage evidence. *See* 53 F.R. 37870 *supra.*, at para. 8; and the Commission wants environmental factors; i.e., RBG's radio frequency (RF) radiation violation considered under the standard comparative issue. *See Environmental Rules*, 60 RR 2d 13 (1986) at paras. 8 and 20; FCC 88M-3098 released September 20, 1988 at para. 7; FCC 88M-3646, released October 31, 1988, and the cases cited there;[4] and FCC 89M-722, released March 6, 1989.

4. We held the prehearing conference on January 11, 1989, an evidentiary admission session on February 16, 1989, and the hearings on March 20-21, 1989. The evidentiary record was closed initially at the end of the March 21, 1989 session. However, it had to be reopened to receive a belated proffer from RBG on August 30, 1989, and then reclosed. *See* FCC 89M-2189.[5] The three applicants along with the Mass Media Bureau filed their Proposed Findings of Fact and Conclusions of Law on May 23, 1989,[6] and the applicants filed their Replies on June 2, 1989.

**Issue 1 - The Standard Comparative Issue**
**Description of the Applicants**

5. *Richardson Broadcast Group.* RBG is a North Carolina limited partnership. It was organized in March, 1986 and was originally formed to purchase WEEB(AM), in Southern Pines. They are presently the licensee of that station. Lawrence E. Richardson is RBG's sole General Partner. He owns 8.85% of RBG's equity and has 100% exclusive control of RBG. (RBG Ex. 1; RBG Ex. 7, pp 7-12; Tr. 196).

6. There are 18 limited partners in RBG. They are prohibited from taking part, directly or indirectly, in the management of RBG. No limited partner will be involved in any material respect in the management or operation of the proposed station.[7] The following chart lists those eighteen Limited Partners and their ownership interest:

**CHART**

| Interest Number | Name and Address | Ownership |
|---|---|---|
| (1) | Hallie Reeves, Pinehurst, N.C. | 3.55% |
| (2) | Hallie C. Reeves, Pinehurst, N.C. | 4.05% |
| (3) | Pinehurst Medical Clinic, Inc., Pinehurst, N.C. | 4.05% |
| (4) | Paul J. Mode, Aberdeen, N.C. | 4.05% |
| (5) | John A. McPhaul, Southern Pine, N.C. | 4.05% |
| (6) | Robert H. Crouch, Pinehurst, N.C. | 4.05% |
| (7) | D an S Investments, Southern Pines, N.C. | 4.05% |
| (8) | Pension Trust for Clay C. Daughtridge, Jr. Pinehurst Medical Clinic, Pinehurst, N.C. | 7.09% |
| (9) | James A. Felton, Southern Pines, N.C. | 4.05% |
| (10) | Peggy K. Crouch, Pinehurst, N.C. | 4.05% |
| (11) | Voit Gilmore, Pinehurst, N.C. | 4.05% |
| (12) | Eleanor C. Honeycutt, Southern Pine, N.C. | 3.55% |
| (13) | Frank A. McNeill, Jr. | 4.05% |
| (14) | H. Vann Austin | |

| | | |
|---|---|---|
| | Pinehurst Medical Clinic, Pinehurst, N.C. | 15.18% |
| (15) | Ira for H. Vann Austin Pinehurst Medical Clinic, Pinehurst, N.C. | 7.09% |
| (16) | Pension Trust for H. Van Austin Pinehurst Medical Clinic, Pinehurst, N.C. | 3.55% |
| (17) | Donald K. Wallace Pinehurst Medical Clinic, Pinehurst, N.C. | 7.09% |
| (18) | Felton Capel, Southern Pines, N.C. | 3.55% |

7. *Elizabeth M. Younts.* It was Jack Younts, Elizabeth Younts' late husband, that filed BPH-870824MG on August 24, 1987. He filed as a sole proprietorship. However, Jack Younts passed away on December 18, 1987, and Elizabeth Younts requested that she be substituted for Jack Younts in the application. The Chief, Audio Services Division accepted her amendment but said "However, Younts will not be allowed to improve its comparative position by this amendment."[8] *See* 53 F.R. 37870 *supra.*, at paras. 2-3. So Elizabeth Younts now is ostensibly the sole proprietor of BPH-870824MS.[9]

8. *GBI Broadcasting Inc.* GBI, a North Carolina Corporation, was formed to construct and operate a new FM station at Southern Pines, North Carolina. GBI has two classes of stock; Class A voting common stock and Class B non-voting common stock. The following chart sets out GBI's corporate composition:

**CHART**

| Name | Office Held | Director | Stock Held |
|---|---|---|---|
| Dwayne Greene | Pres/Treas | yes | 81 shares class A voting |
| Kimberly Greene | Secretary | yes | None |
| James Greene | None | yes | None |
| J. D. Longfellow | None | No | 54 shares Class B non-voting |
| Judith Harte | None | No | 90 shares Class B non-voting |

9. Note that Dwayne Greene holds all of the voting stock, and that represents 36% of the corporation's equity. J. D. Longfellow's 54 non-voting shares representes 24% of the corporate equity, and Judith Harte's 90 non-voting shares represents 40%.

**Diversification of Mass Media**

10. *Richardson Broadcast Group.* RBG is currently the licensee of WEEB(AM), Southern Pines, North Carolina. They have pledged to divest themselves of WEEB if they are awarded the construction permit for the new FM station.[10] In addition, Lawrence E. Richardson (RBG's sole general partner) has indicated that he will resign from and abandon his employment with WEEB(AM) if RBG is granted the FM construction permit.

11. *Elizabeth M. Younts.* Elizabeth M. Younts has no interest in any medium of mass communications.

12. *GBI Broadcasting, Inc.* Neither GBI not its officers, directors or voting stockholders have any interest in any medium of mass communication (GBI Ex. 1, para. 13). However, their non-voting stockholders hold mass communications media interests.

13. J. D. Longfellow is: (1) Secretary of Curtis Radio Group, Inc., licensee of stations WMBL-WRHT, Morehead City, North Carolina; (2) Secretary-Treasurer, Director and 12.8% stockholder of Great American Media, Inc., the sole General Partner of Great American Media Ltd. I, licensee of stations WTAB(AM) and WYNA(FM), Tabor City, North Carolina;[11] (3) President, Assistant Secretary, Director, and 15% stockholder of Coastal Plains Media, Inc., licensee of WCPS(AM), Tarboro, North Carolina; (4) President, Treasurer, Director and 100% stockholder of New Age Communications, Inc., the General Partner of New Age Communications Limited Partnership, licensee of WGBR(AM) and WEQR(FM), Goldsboro, North Carolina (Mr. Longfellow is a limited partner with a 14% equity interest); and (5) a .4% stockholder of Osborn Communications Corporation, licensee of WKTC(FM), Tarboro, North Carolina.[12]

14. Judith P. Harte holds 10 shares of stock in Multimedia Inc. Multimedia, Inc. has interests in numerous media properties. But this small number of shares renders Ms. Hart's "interest" non-attributable. She is also the beneficiary of a trust which, among other things, holds 25,950 shares of Multimedia, Inc. While she receives income from this trust, she doesn't control the trust or vote the shares of any trust-held corporations. She also holds a non-attributable 1% equity interest in Great American Media Ltd. I, licensee of WTAB(AM) and WYNA(FM), Tabor City, North Carolina.

**Best Practicable Service**

15. *Comparative Coverage: Total Areas and Coverage.* The following chart depicts the total area and population within each applicants' proposed 1 mV/m contour (Jt. Eng. Ex. 1, pp. 4, 5):

**CHART**

| Applicant | Area (sq. Km.) | Population |
|---|---|---|
| RBG | 1,803 | 43,986 |
| Younts | 1,787 | 46,972 |
| GBI | 1,817 | 41,692 |

16. *Comparative Coverage: Other Available Services.* All proposed service areas presently receive five or more aural services during daytime hours. The following chart tabulates the areas (in square kilometers), populations, and numbers of other services available nighttime within the non-common portions of each applicant's proposed 1 mV/m contour:

**CHART**

| Other Existing Services | RBG Area | RBG Pop. | Younts Area | Younts Pop. | GBI Area | GBI Pop. |
|---|---|---|---|---|---|---|
| 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 | 1 | 0 | 0 | 0 | 0 | 0 |
| 3 | 79 | 159 | 0 | 0 | 8 | 0 |
| 4 | 93 | 2022 | 1 | 0 | 103 | 389 |
| 5 or more | 627 | 9526 | 626 | 11,656 | 343 | 2,783 |

17. *Comparative Coverage: Intermediate Findings.* Based on Findings 15-16 *supra.*, the following intermediate findings are warranted. Younts will serve 2,986 more people than RBG, and 5,280 more people than GBI. None of the applicants will serve a white area (an area presently receiving no service) or a grey area (an area presently receiving only one service). RBG is the only applicant that will provide service to an underserved area (an area that presently receives four or fewer services). Specifically RBG will provide a new fourth service to 159 people; i.e., 0.3% of the total number of people RBG proposes to serve.

18. Under Commission precedent,[13] Younts has earned a very slight preference over RBG and GBI for her greater overall coverage. Since RBG is the only applicant that would provide a new fourth nighttime service, but that service would be to only 159 people, it would receive only a very slight preference under this coverage subfactor. All in all, the comparative coverage facet is not only far from being *even* significant, such preferences could only become significant if two or more of these applicants finished in a virtual tie under the other comparative criteria.

19. *Environmental Impact.* The Chief, Audio Services Division designated a narrow but *significant* contingent environmental impact against RBG; i,e, an RF radiation issue. *See* 53 F.R. 37870 *supra.*, contingent Issue 1. In so doing the Chief said, "[o]ur study indicates that the operation of the new proposal and the existing WEEB(AM) facilities may significantly exceed the radio frequency radiation guidelines under 47 CFR 1.1307(b) . . . " *See* 53 F.R. 37870 *supra.*, at para. 6.

20. The term "significant" in Finding 19 *supra.*, has been used because of the several types of environmental impact problems that could be designated for hearing, the Commission has emphasized the gravity of the RF radiation problem since it directly impacts on *human health and safety*. *See* the *Report and Order* on the biological effects of radio frequency radiation, 57 RR 2d 1280, released March 14, 1985.

21. Stated another way the Commission is concerned with several different types of environmental problems. In addition to radio frequency (RF) radiation, the Commission tries to make certain that an applicant's transmitter site isn't located near any known wildlife preserve, wilderness area or in an area significant to American history, architecture, archaeology engineering or culture; they want to be certain that the proposed facilities aren't located in a flood plan area; they want to be certain that the proposed facilities will not affect an endangered or threatened species and their critical habitats; and they are concerned about proposals that would equip towers with high intensity white lights. But of these several different types of environmental problems the Commission has expressed the most concern about RF radiation hazards.

22. As previously noted, on March 14, 1985, the Commission established a policy regarding RF radiation hazards and clarified "Commission and licensee responsibilites in this area of growing public concern . . ." and expressed particular concern about radiofrequency that will significantly affect the qualify of the human environment.

23. To determine when radio frequency would become a serious matter, the Commission stated it would be bound by the radiofrequency radiation guidelines adopted by the the American National Standards Institute (ANSI). They opted for the ANSI standards (as opposed to OSHA'S earlier standards) because they " . . . are scientifically based, widely accepted and applicable to the general population as well as to workers . . . "[14] The Commission further explained why they had so opted. They said, "[o]ur concern is that any significant impact on the human environment with respect to RF radiation should be taken into account as part of Commission procedures for approving transmitting facilities and operations."

24. A short time later the Commission changed its procedures for examining *all* environmental impact problems (including RF radiation). *See Environmental Rules*, 60 RR 13, released March 26, 1986, and corrected April 15, 1986. They changed their procedures because they were obligated " . . . to fully integrate environmental considerations in the decision-making process."

25. The Commission divided their environmental decision-making into two contexts, hearing and non-hearing. To aid their *non - hearing* decision-making they adopted a whole set of rules and charged the operating Bureau with carrying out the responsibilities imposed by those rules. *See* 47 CFR 1.1301-1.1319.[15] For *hearing* purposes they specifically instructed their Administrative Law Judges to consider environmental factors under the standard comparative issue. They said this (at 60 RR 2d 13 *supra.*, at para. 8):

> "For licensing purposes, environmental factors may be deemed qualifying and/or comparative issues, and will be evaluated with any other factors that are relevant to determining whether grant of an application is in the public interest . . . In a hearing context, the Administrative Law Judge will evaluate and give due weight to the environmental and nonenvironmental public interest factors in rendering his or her determination."

26. Again, in their conclusions (60 RR 2d 13 at para. 20) the Commission reiterated how it wanted environmental matters treated procedurally. They said:

> " . . . In addition, environmental issues will henceforth be integrated with nonevironmental issues and will be heard and decided together by the Administrative Law Judge in a hearing context, and by the Commission in a non-hearing context . . . "

27. On October 13, 1988, RBG submitted the environmental assessment called for by paragraph 6 of the HDO. *See* Finding 19 *supra.* In that assessment RBG acknowledged that it violated ANSI standards, but promised to build a fence that would contain the RF radiation emissions to a specified area. That Petition for Leave to

Amend was accepted. *See* FCC 88M-3646 released October 31, 1988. The Chief analyzed RBG's assessment, and on January 31, 1989, he recommended that the contingent environment basic qualifying issue that had been specified against RBG be deleted. The Presiding Officer granted the Chief's request, and deleted the basic qualifying RF radiation issue. But he again pointed out that RBG was obligated to present RF radiation evidence under the standard comparative issue. *See* FCC 89M-382, released February 6, 1989; and Findings 25-26 *supra*.

28. Two expert witnesses, Richard L. Biby and John A. Lundin, submitted evidence on the RF radiation generated by the three technical proposals. *See* GBI-Younts Ex. 1 and RBG Exs. 5 and 6. Neither GBI's nor Younts' technical proposals would generate RF radiation at or near ground level in excess of the Commission's guidelines for dealing with RF radiation emissions. GBI-Younts Joint Engineering Exhibit 1.

29. Both engineering experts agreed that RBG's proposed operation would exceed ANSI's (and the Commission's) radiation standards within a four meter area near the base of its proposed tower. The evidence also shows that RBG's proposal would increase RF radiation in the contaminated area of RF radiation within four meters of the station's proposed tower.

30. RBG proposes to address its RF radiation emission problem by building a wooden fence around the tower in that area. But there is already a wooden fence around the existing RBG tower, and it has not been able to keep people away from the tower, and the building that houses the tuning equipment. (*See* RBG Ex. 5; Tr. 282-283, 294, 304-305). Moreover, both experts agree that construction of a fence wouldn't diminish the radiation or eliminate the contaminated area (Tr. 182-183). The contamination would occur in an area that will be occupied by people. WEEB(AM) employees are in and around the base of the tower daily. (Tr. 132, 171, 284-285).

31. Land near RBG's proposed tower has been recently developed residentially. The Knollwood Village Retirement Center is about a quarter of a mile from RBG's proposed tower location (Tr. 276-278).

32. *Environmental Impact: Intermediate Findings*. Based on Findings *19* -31 *supra*., and Footnote 14 *supra*., certain intermediate findings are warranted. GBI and Younts are entitled to a *substantial* and *significant* comparative preference over RBG under the comparative environmental criteria. Their proposed operations will comply with ANSI's RF radiation standards, RBG's will not. RBG proposes a hazardous operation that would pose a serious threat to people's health. There is simply no need to grant a hazardous RF radiation operation if there is a safe one around that can be granted. So RBG will be assigned a significant comparative demerit under the environmental comparison.

33. *Quantitative and Qualitative Integration: Richardson Broadcast Group*. RBG claims 100% quantitative integration. They intend to fully integrate their sole General Partner, Lawrence E. Richardson, into the proposed station's day-to-day operations. Richardson will spend at least 40 hours a week as General Manager of the station. In that capacity he will be responsible for the day-to-day management and operation of the station. Other management personnel will report to him. He will finalize the station's program format, make all the sales and personnel decisions, and implement the Equal Employment Opportunity program.

34. Richardson presently manages WEEB(AM) in Southern Pines, North Carolina. There he supervises the overall operation of the station; he makes the programming decisions, manages the personnel, supervises community relations and public affairs and ensures station compliance with the FCC's rules and regulations. If RBG is granted, Richardson will resign from and abandon his present employment in order to become fully integrated in the proposed FM operation. He will also curtail his civic and other activities if they conflict with his FM duties and responsibilities.

35. Lawrence Richardson, a white non-hispanic male, was born in Southern Pines, North Carolina, in 1955. He resided within Southern Pines' boundaries from 1955 to 1978. Since 1978 he has lived in Aberdeen, North Carolina, about a mile from Southern Pines, and within RBG's proposed 1 mV/m contour. He currently resides at 538 Shelton Drive, Aberdeen.

36. Richardson has *past broadcast experience*. In 1972 he was a part-time disc jockey at WEEB(AM). From 1977-1979, he worked as News Director and Account Executive with WCEL(AM). In 1979, he left broadcasting and worked for the Pine Needles Country Club, Southern Pines, North Carolina. He rejoined WCEL(AM) in 1981 as News Director and Account Executive. He later became the sales manager of the station and held that position until December of 1983, when he became a Regional Account Executive with Capitol Broadcasting, licensee of WBAL(FM). He held that position until 1985, when he became manager of WEEB(AM). *See* Finding 34 *supra*.

37. Mr. Richardson has *participated civically* in community activities within the proposed service area. He has been a member of the First Baptist Church of Aberdeen since 1984 and is a member of the First Baptist Church's Standing Committee for Recreation and for Radio and Audio Programs for 1988-1989. He spends about five hours a week at these activities. Until 1984 he was a member of the Manley Presbyterian Church in Southern Pines where he taught the Youth Group (1974-1976) and a Sunday School Class (1974).

38. Richardson has been a member of the Pinehurst Rotary since 1986. has edited its newsletter since 1987, and been a director of the club since 1988. He spends about four hours a week on Rotary duties. In 1985, he was nominated and became a national finalist for the Rotary Foundation Scholarship in Journalism.

39. From 1979 to 1980, Richardson was a member of the Pinecrest High School Athletic Booster Club, and in 1986-1987, he was Chairman of the Legislative Affairs Committee of the Sandhills Area Chamber of Commerce. Pinecrest, Pinehurst, and Sandhills are all located within the proposed station's 1.0 mV/m contour.

40. *Elizabeth M. Younts*. Mrs. Younts claims 100% quantitative integration. However, she will be awarded 0% integration. She is an inveterate liar and therefore cannot be depended upon to carry out her integration pledge. On nearly all matters pertinent to the standard comparative issue, she was evasive, contradictory and displayed a lack of candor. She dissembled about: (1) her age; (2) her past employment history and her present status as a retired person; (3) her true residence; (4) the past and possible future involvement of her children in the application and proposed station; and (5) about whether her late husband, Jack Younts, intended to serve as General Manager of the proposed station.[16]

41. When Elizabeth Younts took the witness stand she brought with her a paper with notes on it to help her testify. The Presiding Officer noticed the paper, and called her counsel's attention to the possibility that Mrs. Younts might have some documents with her that she didn't want to turn over to opposing counsel (Tr. 316). It was at that initial stage that she became evasive with even her own counsel:

> Mr. Oxenford: " . . . do you have anything up there except your -- your hearing exhibits?
>
> Mrs. Younts: "I -- I have the exhibits that you gave me."
>
> Mr. Oxenford: "Right, Do you have anything else up there with you?
>
> Mrs. Younts: "I have some notes."
>
> Mr. Oxenford: "I -- if we can take those notes off your desk then before we start your testimony."
>
> . . . (Tr. 317)

42. Oxenford then asked Mrs. Younts to give her date of birth for the record. She said she was born on October 19, 1922. GBI's counsel Mark Prak, then asked "Mrs. Younts, how old are you?" Mrs. Younts: "I'm 67." Prak then showed her a copy of her most recent North Carolina driver's license, and asked her, "What date does it state as your date of birth on that, on your driver's license?"

43. Mrs. Younts: "It states -- I can't read it too well. 10/19/19."

> Mr. Prak: " . . . Does it not state October 19, 1919, rather than 1922?"
>
> Mrs. Younts: "1919. Excuse me. I made a mistake."
>
> Mr. Prak: "What is your correct date of birth?"
>
> Mrs. Younts: "I will stay with this one, because it says that I --"
>
> Judge Miller: "Stay with which one?"
>
> Mrs. Younts: "With the driver's license."

44. A short time later (Tr. 364-365), Mrs. Younts became argumentative, and then gave a different explanation for failing to testify truthfully about her age. Prak showed her a copy of her Moore County Voter Registration application that she filed on January 3, 1989, and the following colloquy took place:

> Mr. Prak: " . . . does that document look familiar to you?"
>
> Mrs. Younts: "Yes I -- yes I see it. I've had it."
>
> . . .
>
> Mr. Prak: "Does it [the application] also recite your date of birth?"
>
> Mrs. Younts: "Is this age discrimination?"
>
> Mr. Prak: "I beg your pardon"
>
> Mrs. Younts: "Is this age discrimination, asking me about my birth?"
>
> . . .
>
> Judge Miller: "Why did you ever say '1922' when your counsel asked you?"
>
> Mrs. Younts: "It was a -- misprint in one of the exhibits that was given by Who's Who of America. It was a misprint. It was probably copied from -- from that."
>
> Judge Miller: "who copied it? You, huh?"
>
> Mrs. Younts: "Probably my -- I don't know; I don't know."
>
> . . .

45. On redirect examination, Younts' counsel tried to rehabilitate the witness on this subject of age and date of birth. He succeeded only in eliciting two more inconsistent explanations (Tr. 433-435):

> Mr. Oxenford: "My question was why did you give the date that you initially gave as your date of birth?"
>
> Mrs. Younts: "I didn't want the powers-that-be of the FCC to think I was too old and I did not want to be discriminated against because of my age."
>
> Judge Miller: "That isn't the answer you gave me when I asked you, is it? When I asked you, you said 'oh, I got that out of a book for Who's Who and I just made a mistake.' Isn't that the answer you gave to me, Mrs. Younts?"
>
> Mrs. Younts: "Yes, I did. It's probably vanity, or modesty or something that women have when someone asks them their age?"
>
> . . .

46. Elizabeth Younts was also evasive and less than candid about her past employment history and her present status as a retired person. At her January 4, 1989 deposition she said that she was "retired." But on cross-examination, when Mr. Prak asked her about her ability to carry out her integration proposal, she became evasive (Tr. 320-329):

Mr. Prak: " . . . you're currently retired right now, are you not?"

Mrs. Younts: "I call myself semi retired."

Mr. Prak then called her attention to her deposition testimony, and

Mrs. Younts said: "we discussed it more or less, but actually I was not retired, I was semi retired

. . .

Mr. Prak: "So, do you consider yourself retired?"

Mrs. Younts: "No, not exactly, because I intend to go back to work again."

. . .

Mr. Prak: " . . . So, do you consider yourself retired?"

Mrs. Younts: "Temporarily."

. . .

Mr. Prak: "Did you consider yourself retired at that time [1981]?"

Mrs. Younts: "my husband considered himself retired, so, obviously, I would have been retired also."

Mrs. Younts was then asked *why* she had said at her deposition that she was "retired" and now she was only "semi retired." She responded: "Perhaps I got more interested in owning this FM station, and I considered that now I am not retired . . . "

47. Mrs. Younts was equally evasive in responding to questions about her *past broadcast experience*. Initially she claimed that she worked full-time running radio stations from 1947 to 1981, and then full-time again for five or six months in late 1985 through early 1986 (Tr. 321-322). She said she had worked full-time at WEEB(AM) in Southern Pines during those years. But at her deposition, she said she worked only *part - time* at WEEB(AM) (Tr. 329). At the hearing she then changed her testimony to state that she worked part-time at WEEB and part-time at WUSM, Havelock, North Carolina (Tr. 330-332). From 1962-1969 WUSM, Havelock was another station her husband owned.

48. She next testified that from 1971-1981 she had only worked part-time at WEEB in "an executive capacity." She also indicated that she had not worked full-time since 1971 (Tr. 334). But in the same breath she admitted she had not worked 40 hours a week at any business since 1947, because " . . . I have not been employed. I have been doing volunteer work and had a lot of civic duties to attend to."

49. Elizabeth Younts was also evasive and less than candid about the comparative criterion of *local residence*. In her direct case exhibits she claimed she had "continuously" remained a resident of Southern Pines since 1947. (Younts Ex. 1). But at the hearing it developed that in May of 1984 she and her husband changed their voter registration from North Carolina to Palm Beach County, Florida. They also obtained Florida drivers licenses. She voted in Florida during the 1988 presidential election. It was just before she was deposed in this proceeding that Mrs. Younts turned in her Florida drivers license, obtained a North Carolina license, and changed her voter registration back to North Carolina. (Tr. 352-367).

50. Mrs. Younts' testimony about her residence in Florida from 1984 to 1989 is another maze of inconsistencies. First, she said her husband wanted to retire and move to Florida and she went along with the decision (Tr. 353). In order to obtain a Florida drivers license and voting registration, she gave as her residence "1011 Forest Court . . West Palm Beach, Florida." This address is the home of her Florida lawyer. Then she said that she and her husband had moved to Florida because her husband's health had not been good. (Tr. 358). However, it developed that North Carolina has a personal income tax, Florida doesn't, and that the Younts didn't file personal income tax returns in North Carolina from 1984 to 1989.[17]

51. In her direct testimony, Mrs. Younts swore that "[t]he move to Palm Beach County, Florida never took place, and I have continuously remained a resident of Southern Pines since 1947." She finally admitted that "[t]hat is not accurate. I'm sorry. I don't know whose mistake that is." (Tr. 362).

52. Mrs. Younts' testimony about the past and possible future involvement of her children in her application and her proposed station was equally evasive and less than candid. She has three children, and all three are employed in the communications industry. One of her children, her son Millard "Mitts" Younts is a media broker with Chapman Associates in Washington, D.C. The following excerpts illustrate that evasiveness and lack of candor. (Tr. 381-382, 397-399, 402-404):

Mr. Prak: "The question is have you conferred with your son, Mitt Younts, regarding the prosecution of your application?"

Mrs. Younts: "No, my son is an adviser to me and he is only in an advisory capacity."

Mr. Prak: " . . . My question is have you talked to him about this?"

Mrs. Younts: "I talk to him a lot on the phone and in person."

Mr. Prak: " . . . do you ever talk to him about the application, the FM station?"

Mrs. Younts: "He knows about it."

Mr. Prak: "Have you ever talked to him about the FM station?

Mrs. Younts: "He knows about the fact that I filed an application."

Judge Miller: "Have you ever talked to him about the application?

Mrs. Younts: "Some, Yes, I have talked to him, yes."

Mr. Prak: " . . . Has he advised in connection with your prosecution of the application?"

Mrs. Younts: "only in an advisory capacity"

Mr. Prak: " . . . but what I am asking you is if he advised you?"

Mrs. Younts: "about what?"

Ms. Moline: "Did your son, Mitt, serve in an advisory capactiy to your late husband with regard to the FM application?"

Mrs. Younts: "I do not know."

Ms. Moline: "He has advised you on occasion with regard to the FM application?"

Mrs. Younts: "No"

Judge Miller: "Forgive me. I don't understand what you just said. You said that your son has acted in an advisory capacity as far as this FM station is concerned with you, right?"

Mrs. Younts: "I just said no."

Judge Miller: "He never acted in an advisory capacity?"

Mrs. Younts: "He acts as advisory capacity on many many things . . . "

. . .

Ms. Moline then referred Mrs. Younts back to her deposition. She particularly pointed out that Mrs. Younts had testified that she (Younts) had first learned that an FM frequency was going to be allotted to Southern Pines when she heard her late husband discussing it with her son, Mitt.

53. Ms. Moline (RBG's counsel) then asked Mrs. Younts whether she knew that her son, Mitt, had discussed the FM application with her late husband and former counsel, Gary Smithwick. Mrs. Younts said "I have no knowledge of that." Ms. Moline then referred Mrs. Younts to her deposition where she, Younts testified that her son Mitt had been present in the room when Gary Smithwick and Mrs. Younts were discussing her FM application, and that he had taken part in those discussions but "only in an advisory capacity."

Ms. Moline: "What do you mean by only in an advisory capacity?"

Mrs. Younts: "He did not advise me what to do about the FM application. He advised me on many other matters. And when Gary Smithwick came down for the deposition, he was visiting me at my home and was in the room."

Judge Miller: "He (Mitt) said something to you, didn't he?"

Mrs. Younts: "He said a few things to me but

Judge Miller: "about the application?"

Mrs. Younts: "I don't remember."

Judge Miller: "what does in an advisory capacity mean if he didn't do anything?"

Mrs. Younts: "He may have advised me about a lot of things, as I have said before."

Judge Miller: "I know, but I am talking about the application. Now, I would like -- you know what I'm talking about, I am talking about the application."

Mrs. Younts: "All right. He told me that for me to make my own decision about the FM application and that he did [not] want anything to do with it. He is a media broker. He is very successful. He was not interest[ed] in the radio station or managing the radio station and that is for the record."

Judge Miller: "Well, then he didn't advise you? He didn't act in an advisory capacity then, did he? If that's what he said."

Mrs. Younts: "That's what he told me, to make my own decisions. That's an advisory capacity. He advised me to make my own decision. Wouldn't that be considered advisory capacity.?"

. . .

54. Finally, Mrs. Elizabeth Younts testified evasively and inconsistently about whether her late husband would have claimed 100% quantitative integration and served as General Manager of the FM station. In her direct case exhibits she swore that "[t]he original applicant, my deceased husband, Jack S. Younts would have claimed 100% integration credit . . . " *See* Younts Ex. 1, p. 1.

55. However, at the hearing, she testified that as early as 1981 "my husband considered himself retired" (Tr. 324). This led her opponents to inquire into the basis for her statement that her late husband would have claimed 100% integration credit. (Tr. 369-370).

Mr. Prak: "Mrs. Younts, after your husband filed the application with the FCC for the construction permit [in 1987], do you know, was he planning to be the General Manager of the proposed station and operate the station by living in Southern Pines, or was he planning to retire to Florida?"[18]

Mrs. Younts: "I can't speak for him. I'm sure he was going to be a resident of North Carolina, but I cannot speak for him."

Judge Miller: "Well did he change his driver's license [in 1984] when you did?"

Mrs. Younts: "I don't recall."

Judge Miller: "Did he change his voting registration [to Florida] when you did?"

Mrs. Younts: "Yes."

. . .

Mr. Prak: "Now, how do you know that your husband would have claimed 100% integration credit?"

Mrs. Younts: "As I said before, I cannot speak for him, but I'm sure that if he were here, he would have -- he would have changed his voter registration and he would have changed his domicile to the Southern Pines area again."

Mr. Prak: "How do you know that?"

Mrs. Younts: "I don't know that. I can't speak for him."

. . .

56. However, on redirect examination, Mrs. Younts' memory suddenly returned to her.

Mr. Oxenford: "You were also asked a question regarding whether or not you knew if your husband would have claimed integration credit in this proceeding. Do you know whether your husband planned to work at the radio station?"

Mrs. Younts: "I think he -- I am sure that he planned to work at the radio station."

Mr. Oxenford: "Did you discuss it with him?"

Mrs. Younts: "Yes."

Mr. Oxenford: "When you were asked whether he planned to claim 'integration credit' and you said that you didn't know, why did you answer that question in that manner?"

Mrs. Younts: "That term is rather confusing to me. I am not really sure [what] it means."

Mr. Oxenford: "Which term is that?"

Mrs. Younts: "Integration credit."

57. On recross, Mr. Prak directed Mrs. Younts attention to her own use of the words "integration credit" in her direct case. *See* Younts Ex. 1, page 1, paragraph 2. He then asked her if when she read over her exhibit before signing it did she ask her counsel about the term "integration credit." Mrs. Younts said, "No, I didn't." (Tr. 435-436).

58. Mr. Prak then asked Mrs. Younts how she knew that her husband planned to go back to Southern Pines and manage the FM station. (Tr. 435-437):

Mrs. Younts: "I heard him talking about it and I heard him making plans and talking to people over the telephone, and also he talked with me about it. But he did not give me all the details of it."

Mr. Prak: "Well, did he tell you that he was going to work as the full-time general manager, 40 hours or more per week?"

Mrs. Younts: "Yes."

Mr. Prak: "When did he tell you that?"

Mrs. Younts: "Oh, over a period of a year-and-a-half before his application was filed."[19]

Mr. Prak: "When did he first tell you that?"

Mrs. Younts: "The summer of 1987."

Mr. Prak: "Do you recall what month in the summer of 1987?"

Mrs. Younts: "About the time that the application was filed, August possibly.[20]

59. Elizabeth Younts claims credit for some 20 local civic activities. However, and in keeping with the Chief, Audio Services Division's ruling that she cannot improve her comparative position (see Finding 7 and Footnote 8 *supra*.), she will only be credited with those civic activities that Jack Younts also participated in when he was alive; i.e., the United Way, the Southern Pines Chamber of Commerce, the Southern Pines Centennial Exhibit, and the Moore County Historical Association.

60. Mrs. Younts claims past broadcast experience. She asserts that she was Secretary/Treasurer of station WEEB(FM), Southern Pines, North Carolina from 1974 to 1981, and from 1985 to 1986, and Vice-President of WUSM(AM), Havelock, North Carolina from 1962-1969. That claim is rejected. *See* Findings 47-48 *supra*.

61. *GBI Broadcasting, Inc.* GBI claims 100% quantitative integration. They intend to integrate Dwayne Greene, their 100% Class A voting stockholder into the proposed FM's day-to-day operations. He will serve as the full-time General Manager of the proposed station; i.e., 40 or more hours per week. In that capacity he will supervise all aspects of the station's day-to-day operation. The Sales Manager and the Program Director will report to him, and he will establish and implement policies and procedures for the station.

62. If GBI is awarded the construction permit Greene will resign his current employment and devote all of his efforts to operating the new station. He will also curtail or, if necessary, eliminate all other business and investment so he can devote his full attention to the successful operation of the station.

63. Dwayne Greene, a black male, was born in Raleigh, North Carolina in 1960. He currently resides in Raleigh, about 80 miles from Southern Pines. If GBI is awarded the construction permit, Greene will move to Southern Pines and reside there. Greene graduated from North Carolina State University in 1984 with a Bachelors Degree in Speech Communication.

64. From August 1986 through early November 1987, GBI worked as a broadcast sales person for WDUR(AM) and WFXC(FM), Durham, North Carolina. There he sold advertising, drafted advertising copy, and serviced and collected accounts. It was while he was working there that he met J. D. Longfellow. *See* Findings 8-9 *supra*.

65. Greene is currently employed by Raleigh Nights, Inc., which owns a number of nightclubs and restaurants in the Raleigh-Durham area. He is the Secretary and Treasurer of the corporation, and oversees all of the operations of the properties. Greene claims the integration enhancement that is due a black, non-hispanic male.

66. GBI's two opponents, RBG and Younts, have attacked GBI's proposal. They say that because non-voting stockholder, J. D. Longfellow played a substantial role in GBI's formation, it renders Dwayne Greene a "puppet" and GBI's integration proposal a "sham." They argue that GBI should be assessed a diversification demerit for Longfellow's broadcast holdings (see Finding 13 *supra*.) and awarded less than 100% quantitative integration credit.

67. Those attacks will be rejected. It's true that non-voting shareholder, J. D. Longfellow, did play an important role in GBI's formation. But the role played by non-voting shareholders in the formation of an applicant, standing alone, isn't dispositive of whether the applicant once established as an ongoing business, will be secretly managed by its passive investors.[21] In fact, there is evidence in this record that goes in the other direction.

68. GBI admits that non-voting stockholders Longfellow and Harte are willing to provide the financing for construction and operation of the station. They further admit that Longfellow was involved in many of the initial steps that were needed to form GBI and that he got the engineering firm started so that they (GBI) could file a *timely* application.

69. But GBI then points out that both Longfellow and Harte have committed themselves to being passive investors; that Greene wants to own and actively manage a radio station; and that he (Greene) has some radio experience, and has developed an interest in, and an aptitude for the business.

70. Both Longfellow and Judith Harte currently hold passive investment interests in businesses that operate broadcast stations. For example, Longfellow has a .4% interest in Osborn Communications Corporation, and Harte in Multimedia and Great American Media Ltd. I (*See* Findings 13-14 *supra*.). The record shows that they are interested in passively investing in another radio property. Stated simply, their willingness to accept a passive role in GBI isn't alien.

71. It's true that Longfellow and Harte are white and that Greene is black. It's further true that Dwayne Greene seeks (and is entitled to) that qualitative integration that is due a black, non-hispanic male. (*See* Finding 65 *supra*.). But these facts do not undercut the *bona fides* of GBI's proposal. Longfellow and Dwayne Greene met at work (see Finding 64 *supra*.). They had discussed Greene's desire to manage a business (Tr. 451-456; and 715). Based on those conversations Longfellow decided that to back Greene financially was a great opportunity from an investment standpoint, and that Greene deserved to get into broadcasting in an ownership role. Not only that, he recommended the investment to Judith Harte (Tr. 690). Moreover, Dwayne Greene holds 36% of GBI's equity- a far cry from the pittance held by minorities in many of our comparative cases.

72. RBG and Younts assert that there are evidentiary conflicts about the Longfellow-Dwayne Greene relationship. Certainly there were some evidentiary inconsistencies.[22] However, they are neither significant nor material. In fact, it is found that they are trifling discrepancies. But to be on the safe side, some demeanor findings on Dwayne Greene, J. D. Longfellow, and Judith Harte are appropriate. The Presiding Officer had full opportunity to observe the demeanor of those three witnesses. Unlike Elizabeth Younts (*See* Findings 40-59 *supra*.), they all proved to be credible witnesses. They looked the Presiding Officer full in the face; they used natural gestures; and they testified in their own accustomed language. It is found that Greene, Longfellow, and Harte did not intentionally render inaccurate testimony in this case.

73. Summarizing the GBI witnesses' demeanor findings, GBI and its principals are who they claim to be: a company formed for the purpose of building and operating an FM radio station at Southern Pines, North Carolina, structured in a fashion designed to meet the legitimate and *bona fide* business goals of Dwayne Greene, J. D. Longfellow, and Judith Harte.

74. *Auxiliary Power*. All three applicants propose to use auxiliary power to ensure station operation during power outages.

## ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Three competing applicants seek a construction permit for FM Channel 273A at Southern Pines, North Carolina: Richardson Broadcast Group (RBG); Elizabeth M. Younts (Younts); and GBI Broadcasting, Inc. (Greene or GBI).

2. The only factual issue that needs to be resolved is the standard comparative issue. *See* 53 F.R. 37870 published September 28, 1988. So we must determine which of the proposals would, on a comparative basis, best serve the public interest. However, in addition to the usual standard comparative criterion, we must adduce evidence on comparative coverage and comparative RF radiation. *See* Findings 15-18 *supra*., and 19-31 *supra*.

3. In deciding the standard comparative issue we'll analyze the three applicants under the criteria set out in the Commission's 1965 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 395 as modified by subsequent Review Board and Commission decisions; e.g. see *Environmental Rules*, 60 RR 2d 13 (1986), and Findings 24-26 *supra*.

4. We will direct our comparative analysis toward two primary objectives: (1) Selecting the applicant that will offer the greatest diffusion of control of mass communications media (diversification) and (2) Selecting the applicant that will offer the best practicable service to the public.

5. *Diversification of Mass Media.* No comparative preferences or demerits will be awarded under the Commission's first primary objective. *RBG*, currently the licensee of WEEB(AM), Southern Pines, North Carolina, has pledged to divest themselves of WEEB(AM) if their FM application is granted. So they have no attributable media interest. Finding 10 *supra. Elizabeth Younts* has no media interests. Findings 11 *supra.* Neither *GBI* nor its officers, directors, and voting stockholder have any media interests. While their non-voting stockholders do have some media interests, they are not relevant to the comparative analysis in this proceeding. *See Ownership Attribution*, 97 FCC 2d 997 (1984) 1020-1021, 55 RR 2d 1465 (1984); *recon. granted in part*, 58 RR 2d 604, 615 (1985), *Further reconsideration granted in part*, 1 FCC Rcd 802, 803-804, 61 RR 2d 739 (1986).

6. *Best Practicable Service.* Since none of the three applicants are entitled to a preference under the Commission's first primary objective, we turn to the second objective. In deciding which of the three will offer the best practicable service to the public, we will consider five criterion: (1) whether any applicant or applicants should be preferred because of a superior areas and population proposal (comparative coverage); (2) whether any applicant or applicants should be preferred because they pose less of a hazard to human health and safety in terms of RF radiation; (3) the degree each will integrate their ownership into the day-to-day management of the proposed station (quantitative integration); (4) the qualities each integrated owner will bring to that day-to-day management (qualitative integration); and (5) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority and/or female ownership. Criterion 4 (qualitative integration) *supra.*, includes such factors as local residence, participation in civic affairs within the proposed service area, past education and business experience, past broadcast experience, and auxiliary power.

7. *Criterion 1: Comparative Coverage:* No decisional or even substantial preference will be awarded under this criterion. Younts earns a *de minimis preference* over RBG and GBI for her greater overall coverage, and RBG is entitled to a *very slight preference* over Younts and GBI for bringing a 4th aural service to 159 people. But unless two more of these applicants finish in a virtual dead heat comparatively,[23] this criterion will play no role in the outcome of this decision. *See* Findings 15-18 *supra.*

8. *Criterion 2: Environmental Impact.* Younts and GBI are entitled to a *decisional preference* over RBG because they pose less of a hazard to human health and safety. Neither Younts' nor GBI's technical proposal would generate RF radiation at or near ground level in excess of the Commission's guidelines for dealing with RF radiation emissions.

9. But RBG's would. Their proposed operation would exceed ANSI's (and the Commission's) radiation standards within a four meter area near the base of its tower. Moreover, RBG would increase RF radiation in an already contaminated area within four meters of the station's proposed tower.

10. RBG says it will address its RF radiation emissions by building a wooden fence around the tower in that area. But there is already a wooden fence around RBG's existing WEEB(AM) tower, and it has failed to keep people away from the tower. Moreover, a fence will not diminish the radiation, nor eliminate the contaminated area. There is residential development near RBG's proposed tower.

11. Stated simply, there is no need to grant an engineering proposal that would pose a serious threat to people's health when there is a safe one around that can be granted. So, on this criterion, a grant of either Younts or GBI is in order. *See* Findings 19-23 *supra*

12. *Criterion 3: Quantitative Integration:* All three applicants claim 100% quantitative integration. RBG and GBI have sustained their claims. Elizabeth Younts has not. *See* Findings 33-37 *supra.* The reasons her claim cannot be credited is because she dissembles, not occasionally, but constantly. She is an inveterate liar, an therefore can't be depended upon to carry out her integration pledge. *See* Findings 40-60 *supra.*

13. During the course of the hearing, she lied about her age; she lied about her past employment history; she lied about her present status as a retired person; she lied about her residence; she lied about the past and possible future involvement of her children in her application; and she lied about whether her late husband, Jack Younts, intended to serve full-time as General Manager of the proposed FM station if he received the grant. In brief, you can't believe anything she says, and it would be dangerous to credit any part of her integration claim. Since Mrs. Younts is being credited with 0% quantitative integration, her application will not be considered further. *See New Continential Broadcasting Co.*, 88FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983) at 649.[24]

14. *Criterion 4: Qualitative Integration:* As noted, both RBG and GBI are entitled to 100% quantitative integration. RBG will fully integrate its *sole General Partners*, Lawrence E. Richardson, into the proposed station's day-to-day operation as General Manager. GBI will fully integrate its *sole voting stockholder*, Dwayne Greene, into their proposed day-to-day operation as General Manager.

15. RBG deserves a substantial preference over GBI on the sub-criterion of *local residence* " Lawrence Richardson has lived within RGB's proposed 1 mV/m contour his entire life. Dwayne Greene presently lives in Raleigh, about 80 miles away. He'll move to Southern Pines if GBI is awarded the construction permit. Compare Findings 35 and 63 *supra.*

16. RBG deserves a substantial preference over GBI on the sub-criterion of *civic participation* within the proposed service area. Lawrence Richardson was active in Southern Pines' civic activities when he lived there, and he has actively participated in Pinehurst's and Aberdeen's civic affairs since 1984. Since Greene has never lived within the proposed station's 1 mV/m contour, he cannot claim any civic participation. Compare Findings 63-65 *supra.*

17. RBG deserves a preference over GBI on the sub-criterion of *broadcast and business experience.* Richardson has about ten years of broadcast experience, six in sales, and four in management. GBI only has a little over a years broadcast experience, principally in sales, although he did draft advertising copy. He has some non-broadcast management experience, and his educational background

deserves some credit. He graduated from North Carolina State University in 1984 with a Bachelor Degree in Speech Communication. Compare Findings 34-36 *supra.*, with Findings 63-65 *supra.*

18. Neither applicant is entitled to a comparative preference on the sub-criterion of *auxiliary power. See* Finding 74 *supra.*

19. *Criterion 5: Minority Enhancement.* GBI deserves an above- average preference over RBG under this criterion. Dwayne Greene is black and is entitled to the integration enhancement that is due a black, non-hispanic male. Lawrence Richardson is a white, non-hispanic male and therefore entitled to no enhancement whatsoever.

## ULTIMATE CONCLUSIONS

20. Under Issue 2 (see Finding 2 *supra.*), we must determine which of the three remaining applicants should be granted under the evidence adduced under the standard comparative issue.

21. None of the three (RBG, Younts, and GBI) warrant a preference under the Commission's diversification of mass media objective. *See* Conclusions 4-5 *supra.* So we must seek our winner under the Commission's second objective; i.e. we must determine which of the three will offer the best practicable service to the public.

22. At the outset we must eliminate Elizabeth Younts from further consideration. Although she claims 100% quantitative integration, she has failed to sustain that claim. The record evidence overwhelmingly demonstrates that Mrs. Younts is a chronic liar. Her testimony about her integration claim was false, evasive, and inconsistent. She couldn't even be candid with her own lawyer. Consequently, she must be credited with 0% quantitative. And since both RBG and GBI have sustained their 100% quantitative integration claims, no further comparative consideration will be given her application. *See* Conclusions 12-13 *supra.*

23. We turn then to RBG and GBI. RBG is entitled to a *very slight preference* over GBI under the best practical service's *first* criterion, comparative coverage. On the *second* criterion, environmental impact, GBI is entitled to a *substantial* and *decisionally significant* preference over RBG. *See* Conslusions 8-11 *supra.* The environmental impact problem in this case is not one of aesthetics. We're not concerned with a wild life preserve or rare flowers in a flood plain. *See* Finding 21 *supra* Our environmental problem here involves *human life* and *safety.*[25] The evidence clearly shows that GBI's proposal will pose no threat to human life and safety, but RBG's will. *See* Conclusions 8-11 *supra.*

24. Neither RBG nor GBI are entitled to a preference under the Commission's *third* best practicable service criterion. As previously noted, both applicants have sustained their claim to 100% quantitative integration. *See* Conclusions 12 and 22 *supra.*

25. RBG has all the best of it under best practicable service criterion *four*, qualitative integration. RBG's sole General Partner, Lawrence Richardson has earned *substantial* preferences over GBI's sole voting stockholder, Dwayne Greene, under the sub-criterion of *local residence*, and *civic participation* (Concusions 15-16 *supra.*). He also deserves an average preference over Greene under the sub-criterion of *broadcast and business experience*, although GBI's broadcast background is not weak by any means. (Conclusion 17 *supra.*). Neither applicant is entitled to a comparative preference under the sub-criterion, auxiliary power (Conclusion 18 *supra.*).

26. GBI deserves an *above - average* preference[26] over RBG under best practicable service criterion *five*. GBI's Dwayne Greene is entitled to the integration enhancement that is due a black, non-hispanic male. Lawrence Richardson gets no enhancement whatsoever. He's a white, non-hispanic male (Conclusion 19 *supra.*).

27. In Summary (Conslusions 20-26 *supra.*), RBG deserves a very slight reference on Criterion 1 (comparatige coverage), and a *substantial* preference on Criterion 4 (qualitative integration). GBI has been awarded a *substantial* and *decisional* preference over RBG on Criterion 2 (Environmental impact), and an above-average preference under Criterion 5 (minority enhancement). Nobody deserves any preference under Criterion 3 (quantitative integration).

28. Thus, it is clear GBI prevails handily over RBG. The Commission's best practicable service objective can best be met by granting the application of a relatively inexperienced, but nevertheless adequate, minority applicant with a safe, non-hazardous proposal over the application of an experienced local broadcaster whose proposal poses a serious threat to the public health and safety.

29. In fact, GBI would prevail even without Dwayne Greene's minority enhancement claim. The *decisional* advantage they obtain under the RF radiation facet of this case far outweights the edge accorded RBG's *superior* qualitative integration. GBI is declared the winner.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion,[27] Greene Broadcasting, Inc.'s application (BPH-870824MI), IS GRANTED; and

Richardson Broadcasting Group's (BPH-870824MG), and Elizabeth Younts' (BPH-870824MH), applications ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

## FOOTNOTES

[1] On September 22, 1989, the law firm that represented Richardson Broadcast Group withdrew as counsel.

[2] *See* FCC 89M-586 released February 21, 1989.

[3] For organizational purposes and clarity the standard comparative issue and the ultimate conclusionary issue have been renumbered.

[4] The Commission is deeply concerned about RF radiation hazards. *See e.g. Biological Effects of Radio Frequency Radiation*, 57 RR 2d 1280 (1985), 51 F.R. 11151.

[5] The Presiding Officer turned down three other attempts to get the record reopened. *See* FCC 89M-1505, released May 19, 1989; FCC 89M-1614, released June 7, 1989; and FCC 89M-1806, released July 6, 1989. Judging from the number of attempts to get the record reopened the parties may not be happy about the way they tried this case.

[6] The Mass Media Bureau addressed only the comparative coverage factor.

[7] One limited partner, Felton Capel, provides the play-by-play for local high school sports on WEEB(AM), as he has for several years (Tr. 207). This volunteer (unpaid) activity is neither material nor managerial.

[8] The parties agree that the Chief's admonition means that Mrs. Yount can't claim female enhancement. But insofar as the record evidence permits, the Presiding Officer intends to apply that admonition to all the comparative criteria; e.g. civic participation, and local residence.

[9] The word "ostensibly" has been used because the record evidence *infra*., casts severe doubts about her credentials and/or ability to function as a sole proprietor of an FM station in Southern Pines.

[10] It has become standard practice for an FM applicant to avoid a comparative diversification demerit *simply* by pledging to divest themselves of their existing aural holding(s) if they are granted. But if the Commission is really serious about bringing a new FM service to the community, *as quickly as possible*, it is highly questionable whether we should credit that pledge in a comparative hearing. For even *assuming* that the pledge was made in good faith, it isn't always easy for the FM permittee to dispose of his existing station-at the price he wants - especially those in small market communities. That can, and frequently does, take a considerable length of time, thereby frustrating the Commission's speedy service objective. Stated another way, crediting an FM applicant's divestment pledge, even a good faith pledge: (1) allows the applicant to skirt the Commission's goal of diffusing control of mass communications media; (2) allows the applicant to circumvent the Commission's speedy service objective; and (3) encourages trafficking. Is it worth it?

[11] On March 13, 1989, Great American Media Ltd. I applied for authority to construct a new FM station at Fair Bluff, North Carolina.

[12] *Osborn Communications Corporation (Osborn)*, a publicly traded NYSE corporation, owns 100% of the voting stock of *O. C. C. Inc.* O.C.C. Inc., in turn, owns 100% of the voting stock of *Ladner Communications Holding Corporation* (Ladner).

*Ladner* owns 100% of the voting stock of (1) Beatrice Broadcasting Corp., licensee of WPLJ(AM) and WKRZ, Wilkes-Barre, Pennsylvania; (2) Nelson Broadcasting Corp., licensee of WGIG(AM) and WFIF(FM), Brunswick, Georgia; and (3) Currey Broadcasting Corp., licensee of WTJS(AM) and WTNV(FM), Jackson, Tennessee.

*O. C. C., Inc.* owns 100% of the voting stock of: (1) RKS Television, Inc., licensee of WJSU-TV, Anniston, Alabama; (2) Mountain Radio Corp.; licensee of WWVA(AM) and WOVK(FM), Wheeling, West Va.; and (3) Orange Communications, Inc., licnesee of WNDR(AM) and WNTQ(FM), Syracuse, N.Y.

*Osborn* also owns: (1) 49.5% of Fairmont Communications Corp., the 100% owner of Bay Broadcasting, Inc., licensee of KIOI, San Francisco, Calif; (2) Ward Broadcasting Corp., licensee of WLAC(AM) and WLAC(FM), Nashville Tenn.; (3) Renaisannce Broadcasting Corp., licensee of WMTG(AM), and WNIC(FM), Dearborn, Michigan; (4) Southwest Radio Corp., licensee of KKOB(AM) and KKOB(FM), Albuquerque, New Mexico; and (5) 100% of Osborn of Ohio, Inc., licensee of WAZU(FM), Springfield, Ohio.

[13] *See Simon Geller*, 90 FCC 2d 250, 268-269, 276 (1982); and *Radio Jonesboro, Inc.*, 55 RR 2d 996-997 (Rev.Bd. 1984).

[14] All RF radiation standards are currently being reduced; i.e. made more stringent, due to extra absorbtion of RF energy around 40 to 90 megaHz. While RF radiation hasn't yet been conclusively branded a cancer-causing agent, it does pose a significant threat to human health. It is known to cause cataracts and thermal loading. And there is widespread concern that it has reproductive, immunological, endocrine, and/or behavioral effects. Radiofrequency radiation is far more dangerous than some other types of non-ionizing radiation. For instance, there are more intense exposures and a far greater number of workers are exposed to RF radiation than in the case of miocrowave radiation. *See Richard L. Oberdorfer*, FCC 87M-1632, released July 13, 1987.

[15] These changed procedures became effective on July 21, 1986. But the Mass Media Bureau has continued to use the hearing context to obtain some of the facts they need to make their non-hearing environmental decisions. However, the wording of the contingent environmental issue they use to obtain those facts has been altered. Compared HDOs released before July 21, 1986 with those released after that date. For example, compare 49 F.R. 5665 (El Paso,Texas) published February 14, 1989, and 49 F.R. 32457 (Maurice, Louisiana) with the Bend, Oregon HDO, 52 F.R. 10411, published April 1, 1987, and the instant HDO.

[16] This 5th factor is relevant to the standard comparative issue because of the way the Hearing Designation Order was constructed. *See* Finding 7 and Footnote 8 and 9 *supra*. Ms. Younts was evasive and less than candid on other topics, but these five examples will suffice.

[17] During this area of cross-examination, Mrs. Younts claimed she misunderstood the question. (Tr. 361).

[18] Keep in mind that the Younts were already residing in Florida, and had resided there since 1984. Also keep in mind that Mrs. Younts has testified that they had moved to Florida either because her husband wanted to retire there, or because her husband's health had not been good. *See* Findings 49-50 *supra*.

[19] Jack Younts filed his Southern Pines FM application on August 24, 1987. This would mean that he first told her that he would be the full-time General Manager around March of 1986. But see the following testimony above.

[20] Thus you can see that this woman reached a state where she couldn't put two *consistent* sentences together. Perhaps she wasn't listening to or couldn't hear, or couldn't understand the questions Mr. Prak was asking her. But it appeared to the Presiding Officer that Elizabeth Younts had made up her mind that she wasn't going to respond directly to either Mr. Prak or Ms. Moline's questions. Thus we had to engage in a tortuous search for the truth, and (putting problems of conscious and unconscious bais to one side) the Presiding Officer is still not sure Mrs. Younts ever gave us the whole truth.

[21] *See KIST Corp.*, 102 FCC 2d 281 at 291, n. 8; and *Victory Media Inc.*, FCC 88 134, released April 12, 1988.

[22] Seldom, if ever, do two witnesses testify *identically* about the same series of events. One of them (or both) may not have perceived correctly; or one or the other (or both) may have forgotten some of that which he did perceive. But as long as the inconsistencies aren't decisionally significant, they pose no decisional problems.

[23] A review of Findings 15-74 *supra*., makes it appear extremely unlikely that such a comparative tie will occur.

[24] Note, however, that comparative findings on Mrs. Yount were made on all five best practicable service criterion. *See* Findings 7, 40-60 and 74 *supra* It is only further comparative conclusions that aren't necessary.

[25] The Commission has indicated that even though a given environmental problem would have a significant impact, there still might be cases where the public benefits outweigh the

environmental consequences. *See Environmental Rules*, 60 RR 2d 13 *supra*., at Footnote 12. That is not the case with the RF radiation contamination problem presented here.

[26] As opposed to the *substantial* double preference that would be due a black female or an hispanic female.

[27] If exceptions aren't filed within 30 days, or the Commision doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-486**

In the Matter of

Amendment of Section 73.202(b), RM-6913
Table of Allotments,
FM Broadcast Stations.
(Kaukauna and Cleveland, Wisconsin)

## NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

**Adopted: October 19, 1989; Released: November 9, 1989**

By the Chief, Allocations Branch:

1. At the request of WinCom Wisconsin Limited Partnership (petitioner), licensee of Station WKFX(FM), Channel 285A at Kaukauna, Wisconsin, the Commission considers herein a petition for rule making seeking the substitution of Channel 276C3 for Channel 285A at Kaukauna. Petitioner also requests the modification of its license for Station WKFX(FM) at Kaukauna to specify operation on the higher powered frequency. In addition, the petitioner suggests the substitution of Channel 251A for Channel 276A at Cleveland, Wisconsin, and the modification of the license of Station WKTT(FM) at Cleveland to specify operation on the new frequency, in order to permit the Kaukauna upgrade.

2. Channel 276C3 can be allotted to Kaukauna, as that community's first wide coverage area FM service, in compliance with the Commission's minimum distance separation requirements at the site proposed by the petitioner,[1] if the channel substitution is made at Cleveland.[2] Therefore, we are herein issuing a *Show Cause Order* to WKTT, Inc., licensee of Station WKTT(FM) at Cleveland, seeking comments as to why its license should not be modified to specify operation on Channel 251A in lieu of Channel 276A.

3. As requested, we shall propose to modify the license for Station WKFX(FM) at Kaukauna to specify operation on Channel 276C3 in lieu of Channel 285A. However, since the proposal is for a non-adjacent upgrade at Kaukauna, the Commission's policy requires consideration of competing expressions of interest. Therefore, in accordance with Section 1.420(g) of the Commission's Rules, if there is a competing expression of interest in Channel 276C3 at Kaukauna, the license of Station WKFX(FM) may not be modified herein unless there is an additional equivalent class channel available at Kaukauna.

4. Commission policy requires that Station WKTT(FM) be reimbursed for the reasonable costs of changing its frequency. Petitioner states its willingness to reimburse Station WKTT(FM) for its reasonable costs incurred in changing frequencies.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Cleveland, Wisconsin | 276A | 251A |
| Kaukauna, Wisconsin | 285A | 276C3 |

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, WKTT, Inc., licensee of Station WKTT(FM), Channel 276A, Cleveland, Wisconsin, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 251A in lieu of Channel 276A.

7. Pursuant to Section 1.87 of the Commission's Rules, WKTT, Inc., may, not later than **January 2, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on WKTT, Inc., to furnish additional information. If WKTT, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, WKTT, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: WKTT, Inc., 1 Washington Square, Cleveland, WI 53015.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **January 2, 1990,** and reply comments on or before **January 17, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Brian M. Madden, Esquire
Robert Clifton Burns, Esquire
Cohn and Marks
1333 New Hampshire Ave., NW
Suite 600
Washington, D.C. 20036
(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Petitioner's proposed site is located 20.9 kilometers (18.6 miles) northeast of Kaukauna. The coordinates are 44-21-00 and 88-02-00.

[2] Channel 251A can be used at the current transmitter site of Station WKTT(FM). The coordinates are 43-59-11 and 87-45-53.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-314**

In the Matter of

Amendment of Section 73.202(b), RM-6773
Table of Allotments,
FM Broadcast Stations.
(Colusa, California)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 10, 1989; Released: November 13, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 54 Fed. Reg. 30567, July 21, 1989, proposing the substitution of FM Channel 276A for Channel 243A at Colusa, California, and modification of the permit of Monument Media, Inc.[1] (petitioner) for Station KKLU(FM). Petitioner filed supporting comments. No other comments were received.

2. As stated in the *Notice*, petitioner's proposal is premised on a desire to eliminate alleged interference in its primary service area created by Station KNVR(FM), Channel 244A, Paradise, California.[2] In this regard, petitioner stated that although the minimum distance separation requirements between Station KKLU(FM) and Station KNVR(FM) are met, favorable terrain conditions at Paradise enable Station KNVR(FM) to provide an unobstructed line of sight into Colusa, and a signal level far exceeding the level predicted assuming uniform terrain. Petitioner advised that according to verified field measurements, Station KNVR's 54 dBu signal will invade approximately 39% of Station KKLU's proposed 1 mv/m signal contour. Additionally, petitioner noted that due to the close proximity of co-channel Station KOIT-FM, Channel 243B, [3] San Francisco, California, and second adjacent Stations KCTC(FM), Channel 241B,[4] and KROY(FM), Channel 245B,[5] it is severely limited in site availability on its present frequency to remedy the noted interference. In further support of its proposal, petitioner comments that since Station KKLU(FM) commenced operations on June 5, 1989, numerous listener complaints have been received regarding interference, as predicted in its supporting engineering report. According to petitioner, permitting Station KKLU(FM) to change channels will enable the station to provide improved service to the community by eliminating the interference within its primary service contour.

3. In view of the above, we believe the public interest would be served by the substitution of channels at Colusa, as requested, in order to remedy alleged interference to the operation of Station KKLU(FM). We note that, while petitioner seeks protection from interference greater than that provided by our rules, the only station cognizably affected by the requested substitution is petitioner's own. As indicated in the *Notice*, Channel 276A can be allotted to Colusa in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's suggested site 0.8 kilometers southeast of the community, or at its present site.[6] Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the permit of Station KKLU(FM) to specify operation on Channel 276A in lieu of Channel 243A at Colusa.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Colusa, California | 276A,298B[7] |

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Monument Media, Inc., for Station KKLU(FM), IS MODIFIED effective **December 28, 1989,** to specify operation on Channel 276A in lieu of Channel 243A, at Colusa, California, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in permit BMPH-880927IH except the channel as specified above. Any other changes except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with permit BMPH-880927IH, except for the channel as specified above, and a license application is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## FOOTNOTES

[1] At the time this proposal was filed, Mark P. Guidotti ("Guidotti") was the permittee of Station KKLU(FM). An assignment of the permit to Monument Media, Inc. ("MMI") (BAPH-890418GI) was subsequently granted June 29, 1989. In this regard, Guidotti advises that he is the majority stockholder and principal officer of Monument, which he affirms has an identical and inseparable interest in this proceeding.

[2] Coordinates at the licensed site of Station KNVR(FM) are 39-47-01 and 121-40-37.

[3] Coordinates at the licensed site of Station KOIT-FM are 37-45-20 and 122-27-05.

[4] Coordinates at the licensed site of Station KCTC(FM) are 38-38-09 and 121-33-11.

[5] Coordinates at the licensed site of Station KROY(FM) are 38-38-54 and 121-28-40.

[6] As indicated in the *Notice*, coordinates at the specified site for Channel 276A at Colusa are 39-12-19 and 122-00-19. Although petitioner indicated an earlier desire to relocate the transmitter for Station KKLU(FM), in recognition that the processing time for a construction permit at an improved transmitter site would delay the initiation of enhanced service to the community, it advises that the proposed substitution could transpire at its currently authorized site at coordinates 39-12-52 and 122-00-23. Petitioner asserts that use of its present site will hasten an immediately improved service to the public, while simultaneously allowing it to ultimately apply for an improved transmitter site as originally requested.

[7] Channel 298B, licensed to Affinity Communications, Inc., for Station KTMX(FM) was omitted from the *Notice*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-471**

In the Matter of

Amendment of Section 73.202(b), RM-6697
Table of Allotments,
FM Broadcast Stations.
(Heidelberg, Mississippi)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 10, 1989; Released: November 13, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Pine Belt Broadcasting, Inc. (petitioner), licensee of Station WEEZ, Channel 257A, Heidelberg, Mississippi, requesting the substitution of Channel 257C2 for Channel 257A and modification of its license accordingly.

2. Petitioner states that its proposal can be accomplished in conjunction with the proposed deletion of Channel 257A at York, Alabama, licensed to Station WSLY, in MM Docket 88-318. Grantell Broadcasting Company, licensee of Station WSLY, has proposed the substitution of Channel 285C2 for Channel 257A at York and modification of its license.[1]

3. We believe the proposal warrants consideration since it could provide a wide coverage area FM station at Heidelberg. A staff engineering analysis reveals that Channel 257C2 can be allotted to Heidelberg in compliance with the Commission's spacing requirements at a site 26.2 kilometers west of the community.[2] We shall also propose to modify the license of Station WEEZ to specify operation on Channel 257C2, in accordance with Section 1.420(g) of the Commission's Rules.

4. In order to provide a wide coverage area station for the Heidelberg, Mississippi area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Heidelberg, Mississippi | 257A | 257C2 |

5. IT IS ORDERED That the Secretary of the Commission SHALL SEND a copy of this Order by regular mail to the following:

William B. Grant
Grantell Broadcasting Company
Route 1, Box 400B
York, Alabama 36925

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 4, 1990,** and reply comments on or before **January 19, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Christopher D. Imlay
Booth, Freret & Imlay
1920 N Street, N.W.
Suite 520
Washington, D.C. 20036
(Counsel for the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] A Report and Order was adopted on August 24, 1989, in MM Docket 88-318, granting the substitution of Channel 285C2 for Channel 257A at York. This action is effective November 6, 1989.

[2] The coordinates for Channel 257C2 at Heidelberg are 31-52-21 and 89-15-41.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-472**

In the Matter of

Amendment of Section 73.202(b), RM-6919
Table of Allotments,
FM Broadcast Stations.
(Lincoln City, Oregon)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 10, 1989; Released: November 13, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by FLS Radio Enterprises (petitioner) requesting the allotment of Channel 236C2 to Lincoln City, Oregon, as its second local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 236C2 can be allotted to Lincoln City in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 236C2 to Lincoln City, Oregon, as its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Lincoln City, Oregon | 244C2 | 236C2, 244C2 |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **January 4, 1990,** and reply comments on or before **January 19, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Hayes, Jr., Esq.
1359 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 44-57-06 and West Longitude 124-00-54.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-473**

In the Matter of

Amendment of Section 73.202(b), RM-6931
Table of Allotments,
FM Broadcast Stations.
(Chamberlain, South Dakota)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 10, 1989; Released: November 13, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Les Kleven (petitioner), requesting the allotment of Channel 260C1 to Chamberlain, South Dakota, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 260C1 can be allotted to Chamberlain in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 260C1 to Chamberlain, South Dakota, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Chamberlain, South Dakota | -- | 260C1 |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **January 4, 1990,** and reply comments on or before **January 19, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Les Kleven
Box 687
Sturgis, South Dakota 57785
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 43-48-30 and West Longitude 99-19-48.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-38**

In the Matter of

Amendment of Section 73.202(b), RM-6517
Table of Allotments,
FM Broadcast Stations.
(Flint, Harbor Beach and Sebewaing
Michigan)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 17, 1989; Released: November 13, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1797 (1989), issued in response to a petition filed by Reams Broadcasting, Inc.[1] (petitioner). The *Notice* proposed the substitution of FM Channel 288B1 for Channel 288A at Flint, Michigan, and modification of the license for Station WWCK-FM to specify operation on Channel 288B1 in lieu of Channel 288A. In addition, the *Notice* proposed the substitution of Channel 279C2 for Channel 289C2 at Harbor Beach, Michigan, and the substitution of Channel 267A for Channel 280A at Sebewaing, Michigan, to accommodate the upgrade at Flint. Majac of Michigan, Inc. (Majac) and Fabiano-Strickler Communications, Inc. filed comments. Petitioner filed reply comments.

2. Fabiano-Strickler Communications, Inc. (Fabiano-Strickler), licensee of Station WCCW-FM, Channel 298A, Traverse City, Michigan, filed comments supporting the proposed substitutions. Fabiano-Strickler is the petitioner in MM Docket 88-620, in which it proposes the substitution of Channel 298C2 for Channel 298A at Traverse City, Michigan, and modification of its license for Station WCCW-FM to reflect the higher class channel. *See* 4 FCC Rcd 1248 (1989). According to Fabiano-Strickler a counterproposal has been filed in that proceeding, requesting the allotment of Channel 298A to Gladwin, Michigan, as its second FM service. Fabiano-Strickler has determined that should Channel 280A be deleted at Sebewaing, Michigan, that channel could then be allotted to Gladwin, removing the conflict between Traverse City & Gladwin. In addition, Fabiano-Strickler expressed its support of the proposed change in Sebewaing's frequency which would permit accomplishment of the desired upgrade at Flint, Michigan.

3. We believe the public interest would be served by the substitution of FM Channel 288B1 for Channel 288A at Flint, Michigan, since it could provide that community with its third wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's proposed site.[2] As indicated in the *Notice*, to accommodate the channel substitution at Flint, it is necessary to substitute Channel 279C2 for Channel 289C2 at Harbor Beach, Michigan, and Channel 267A for Channel 280A at Sebewaing, Michigan. A staff engineering study reveals that Channel 279C2 can be substituted for Channel 289C2, Station WFMM, Harbor Beach, Michigan, at the site specified by the permittee for Station WFMM.[3] The *Notice* gave DCS Radio, holder of the construction permit for Channel 289C2 (BPH870225IB), until April 17, 1989, to file a written statement regarding the proposed substitution and further indicated that if no written statement was filed by that date, DCS Radio would be deemed to have consented to the modification as proposed in the Order to Show Cause. Since a written statement has not been received at the Commission from the permittee, it will be deemed to have consented to the modification. Channel 267A can be substituted for Channel 280A at Sebewaing, Michigan, at the site specified by the permittee for Channel 280A.[4] Likewise, the *Notice* gave Family Stations, Inc., holder of the permit (BMPED8710081ID) for Channel 280A until April 17, 1989, to file a written statement regarding the proposed substitution. Since a written statement has not been received at the Commission from Family Stations, Inc., it will be deemed to have consented to the modification. Petitioner, in comments, has indicated a willingness to reimburse the permittees for Channel 289C2 at Harbor Beach and Channel 280A at Sebewaing, for all reasonable costs incurred in changing frequencies. Since Flint, Harbor Beach and Sebewaing, Michigan, are all within 320 kilometers (200 miles) of the U.S.- Canadian border, concurrence of the Canadian government has been obtained.

4. We have authorized a modification of petitioner's license for Station WWCK-FM, Flint, Michigan, to specify operation on Channel 288B1 in accordance with Section 1.420(g) of the Commission's Rules.

5. As discussed above, we find the substitution of Channel 288B1 for 288A at Flint, Michigan, the substitution of Channel 279C2 for Channel 289C2 at Harbor Beach, Michigan, and the substitution of Channel 267A for 280A at Sebewaing, Michigan, to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Flint, Michigan | 224A, 236B1, 288B1, 300B |
| Harbor Beach, Michigan | 279C2 |
| Sebewaing, Michigan | 267A |

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WWCK-FM, Channel 288A, Flint, Michigan, IS MODIFIED TO SPECIFY operation on Channel 288B1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communicatiions Act of 1934, as amended, that the construction permit of DCS Radio for Station WFMM, Harbor Beach, Michigan, IS MODIFIED TO SPECIFY operation on Channel 279C2 in lieu of Channel 289C2, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in permit BPH870225IB, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with permit BPH870225IB except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHERED ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the permit of Family Stations, Inc. for Channel 280A at Sebewaing, Michigan, IS MODIFIED, effective **December 28, 1989,** to specify operation on Channel 267A in lieu of Channel 280A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in permit BMPED871008ID except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with permit BMPED871008ID except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, that the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this order to the following:

DCS Radio Associates, Ltd.
6250 South Cedar, 12B001
Lansing, Michigan
11101

Family Stations, Inc.
3108 Fulton Avenue
Sacramento, California
95821

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] Majac is the license of Station WWCK-FM, Flint, and is the successor to Reams Broadcasting, Inc., the petitioner in RM-6517. Majac's acquisition of WWCK-FM was approved under File No. BALH-881114HQ, granted December 20, 1988, and effectuated as of January 1, 1989.

[2] The coordinate for Channel 288B1 at Flint are 43-01-18 and 83-41-00.

[3] The coordinates for Channel 279C2 at Harbor Beach are 43-59-06 and 82-25.

[4] The coordinates for Channel 267A at Sebewaing are 43-48-01 and 83-23-38.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-96**

In the Matter of

Amendment of Section 73.202(b), RM-6658
Table of Allotments,
FM Broadcast Stations.
(Harrisonville and Carrollton,
Missouri, and Girard, Kansas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 17, 1989; Released: November 13, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 3905 (1989), proposing the substitution of FM Channel 266C1 for Channel 264C at Harrisonville, Missouri, modification of the license for Station KCFX(FM) at Harrisonville, substitution of Channel 264C1 for Channel 266C at Carrollton, Missouri, modification of the license for Station KMZU at Carrollton, substitution of Channel 256A for Channel 266A at Girard, Kansas, and modification of the license for Station KYPG at Girard. The *Notice* was issued in response to a petition filed by KCFX Radio, Inc. (petitioner). Petitioner, Kanza, Inc., Lowell Communications, L.P., and Columbia FM, Inc., filed comments. Petitioner filed reply comments and a request for expedited action.

2. Petitioner continues to support the substitution of Channel 266C1 for Channel 264C at Harrisonville, and modification of its license for Station KCFX(FM). According to petitioner, the proposed substitution will allow it greater latitude to improve its facilities and also remove an existing short spacing between Station KCFX(FM) and non-commercial Station KKFI(FM), Channel 211C1, Kansas City, Missouri. Petitioner has stated its willingness to reimburse the licensees of Stations KMZU(FM), Carrollton, Missouri, and Station KYPG(FM), Girard, Kansas, for their costs involved in changing channels to accommodate the channel substitution at Harrisonville.

3. Kanza, Inc. (Kanza), the licensee of FM Station KMZU(FM), Channel 266C, Carrollton, Missouri, filed comments consenting to the substitution and modification of its license. Kanza stated its intention to file an application for Channel 264C1 at Carrollton and promptly seek a covering license for the channel.

4. Lowell Communications, L.P. (Lowell), licensee of Station KYPG(FM), Channel 266A, Girard, Kansas, filed comments supporting the substitution of Channel 256A for Channel 266A at Girard. Lowell stated its intention to apply for a construction permit for Channel 256A and to promptly modify the facilities of Station KYPG(FM).

5. Columbia FM, Inc. (CFI), licensee of Station KARO(FM), Channel 269A, urges the Commission to withhold final action in this proceeding until a final Report and Order has been issued in MM Docket 86-103. CFI states that it has expended substantial time, effort and money trying to upgrade its facility at Columbia, and its interest in this proceeding only concerns the proposed substitution at Girard, Kansas. According to CFI, Channel 266A at Girard is licensed at a site that will allow KARO(FM) its upgrade, and while the removal of Channel 266A at Girard does not affect its upgrade, CFI is concerned as to where Channel 266A may resurface in another proceeding.

6. Petitioner, in reply comments, restates its support of the proposal. Petitioner requests that the Commission expeditiously resolve this proceeding as there are no conflicting problems to resolve as all parties have agreed to the proposed substitutions. In response to CFI's concerns, petitioner states that the substitution of Channel 256A for Channel 266A at Girard in no way endangers the potential upgrade of Station KARO(FM) as the deadline for filing counter proposals in that proceeding has long since passed.[1]

7. Based on the above information, we believe the public interest would be served by the substitution of FM Channel 266C1 for Channel 264C at Harrisonville, Missouri. We shall modify the license for Station KCFX(FM), to specify operation on Channel 266C1 in accordance with Section 1.420(g) of the Commission's Rules. Channel 266C1 can be allotted to Harrisonville, Missouri, in compliance with the minimum distance separation requirements provided Channel 266A is deleted from Girard, Kansas.[2] We shall substitute Channel 256A for Channel 266A at Girard, Kansas, and modify the license for Station KYPG, to specify Channel 256A. Channel 256A can be allotted to Girard, Kansas, at the current site of Station KYPG. [3] Lowell Communication, L.P., the licensee of Station KYPG, has consented to the substitution of channels. We shall also substitute Channel 264C1 for Channel 266C at Carrollton, Missouri. Channel 264C1 can be allotted to Carrollton, in compliance with the spacing requirements at the licensed site for Station KMZU.[4] As requested, we shall modify the license for Station KMZU to specify operation on Channel 264C1 in accordance with Section 1.420(g) of the Commission's Rules.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Carrollton, Missouri | 264C1 |
| Harrisonville, Missouri | 266C1 |
| Girard, Kansas | 256A |

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KCFX(FM), Harrisonville, Missouri, IS MODIFIED TO SPECIFY operation on Channel 266C1, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KMZU, Carrollton, Missouri, IS MODIFIED TO SPECIFY operation on Channel 264C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license of Lowell Communications, L.P., for Station KYPG at Girard, Kansas, IS MODIFIED, effective **December 28, 1989,** to specify operation on Channel 256A in lieu of Channel 266A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-880912KD except the channel as specified above. Any other changes, except those so specified under Section 73.6120 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with license BLH-880912KD except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The *Report and Order* in MM Docket 86-103 was released on July 20, 1989, 4 FCC Rcd 5645(1989), granting CFI's request to upgrade Station KARO(FM) from 269A to 268C2. That action was effective September 5, 1989.

[2] The coordinates for Channel 266C1 at Harrisonville are 39-00-57 and 94-30-24.

[3] The coordinates for Channel 256A at Girard are 37-29-02 and 94-50-08.

[4] The coordinates for Channel 264C1 at Carrollton are 39-22-05 and 93-29-40. The alternate coordinates for Channel 264C1 are 39-21-59 and 93-24-12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY, File No. E-87-68

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, File No. E-87-78
Defendants.

**ORDER**

**Adopted: November 3, 1989; Released: November 13, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed formal complaints against, *inter alia*, the above-listed telephone operating companies of BellSouth Corporation (BellSouth). The complaints alleged certain statutory and tariff violations associated with defendants' billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties to the above-captioned complaints have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On November 3, 1989, counsel for AT&T and BellSouth filed a joint motion seeking dismissal of the complaints with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaints IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-87-84

THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY,
Defendant.

**ORDER**

**Adopted November 1, 1989; Released: November 13, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed a formal complaint against The Southern New England Telephone Company (SNET) alleging certain statutory and tariff violations associated with defendant's billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties to the above-captioned complaint have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On November 1, 1989, counsel for AT&T and SNET filed a joint motion seeking dismissal of the complaint with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Phone America of Carolina, Inc.,
Complainant,

v.

| | |
|---|---|
| Carolina Telephone and Telegraph Company, | File No. E-89-360 |
| United Telephone Company of the Carolinas, | File No. E-89-361 |
| United Telephone Company of Florida, Defendants. | File No. E-89-362 |

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**ORDER**

**Adopted: November 2, 1989; Released: November 13, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 20, 1989, Phone America of Carolina Inc. (Phone America) filed the above-captioned formal complaints seeking reimbursement and "other appropriate relief" for interstate access charges levied by the defendants against Phone America for the calendar year 1987. In accordance with Commission rules governing formal complaint proceedings, defendants' answers to the complaint were due on November 2, 1989. On October 27, 1989, however, Phone America filed a Motion for Leave to Withdraw Complaints, stating that discussions with defendants' counsel subsequent to the filing of the complaint established that Phone America did not begin to receive access services from defendants until after the 1987 calendar year.

2. On the basis of the statements contained in the motion, we conclude that there are no longer issues in controversy for the time period covered by the complaints and that these proceedings should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Phone America's Motion for Leave to Withdraw Complaints IS GRANTED, and that the above-captioned complaint proceedings ARE TERMINATED.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Phone America of
Carolina, Inc.,
Complainant,

v. File No. E-89-366

GTE South,
Defendant.

**ORDER**

**Adopted: November 2, 1989; Released: November 13, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 20, 1989, Phone America of Carolina Inc. (Phone America) filed the above-captioned formal complaint against GTE-South seeking reimbursement and "other appropriate relief" for interstate access charges levied by the defendant against Phone America for the calendar year 1987. In accordance with Commission rules governing formal complaint proceedings, defendant's answer to the complaint was due on November 2, 1989. On October 27, 1989, however, Phone America filed a Motion for Leave to Withdraw Complaint, stating that discussions with defendant's counsel subsequent to the filing of the complaint established that Phone America did not begin to receive access services from defendant until after 1987 calendar year.

2. On the basis of the statements contained in the motion, we conclude that there are no longer issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Phone America's Motion for Leave to Withdraw Complaint IS GRANTED, and that the above-captioned complaint proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ACC Long Distance Corp.,
Complainant,

v.

New York Telephone Company — File No. E-89-39

and

New England Telephone Company, Defendants. — File No. E-89-40

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 8, 1989; Released: November 13, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 5, 1988, ACC Long Distance Corp. ("ACC") filed a complaint against New York Telephone Co. ("NYT") and New England Telephone Co. ("NET"), alleging that NYT and NET established unlawful and anticompetitive pre-conditions to ACC's participation in their public telephone equal access ballot, allocation, and presubscription programs. The subject complaint was filed shortly before tariffs seeking to implement these or similar programs had been filed by any of the exchange carriers, including defendants. Defendants were required to implement such programs in consequence of the judgment in the AT&T Divestiture case.[1] On December 8, 1988, pursuant to Transmittal No. 947, NYT filed an amendment to its Tariff FCC No. 41 to implement public payphone presubscription.[2] On December 9, 1988, NET made a parallel tariff filing, pursuant to Transmittal No. 960, to amend its Tariff FCC No. 40 for the same purpose. [3] Subsequently, in the Bureau's *Pay Telephone Presubscription Order*,[4] the complained-of pre-subscription terms of defendants were found to be unlawful, and defendants proposed revisions were rejected, thereby making the subject complaints moot. Subsequently, defendants filed a motion to dismiss, which contained a joint stipulation of complainant and defendants to dismiss with prejudice, on October 19, 1989.

2. Based on the statements in the motion to dismiss, we find that there are no longer any issues in controversy and that these proceedings should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the motion to dismiss be GRANTED.

4. IT IS FURTHER ORDERED that this complaint be DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**FOOTNOTES**

[1] United States v. Western Electric Co., CA No. 82-0192, Order (D.D.C. Oct. 14, 1988).

[2] New York Telephone Company, Tariff FCC No. 41, para. 13.3.3 (b)(6)(iii), 3rd revised page 209.15.1.

[3] New England Telephone Company, Tariff FCC No. 40, para. 13.3.3 (B)(6)(b)(iii), 3rd revised page 210.13.

[4] Pay Telephone Presubscription, Order, DA 89-244, 4 FCC Rcd 2782 (Com. Car. Bur. 1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

TELEPHONE AND DATA SYSTEMS, INC. File No. 10209-CL-P-715-B-88

For Authority to Construct and Operate a Domestic Cellular Radio Telecommunications System on Frequency Block B to serve the Wisconsin 8 - Vernon Rural Service Area; Market No. 715

## MEMORANDUM OPINION AND ORDER

**Adopted: November 1, 1989; Released: November 13, 1989**

By the Chief, Mobile Services Division:

### I. BACKGROUND

1. On March 15, 1989, Telephone and Data Systems, Inc. (TDS) won the lottery for the Wisconsin 8 - Vernon Rural Service Area (Wisconsin 8 RSA), *Public Notice*, Report No. CL-89-107 (released March 16, 1989), and was announced as the tentative selectee on June 9, 1989, *Public Notice*, Report No. CL-89-174 (released June 9, 1989). Century Cellunet, Inc. (Century), a mutually exclusive wireline applicant has filed a petition to deny the application of TDS. TDS has filed an opposition to the petition.[1]

### II. CONTENTIONS

2. In its Petition to Deny, Century argues that TDS has a prohibited ownership interest in more than one application for the Wisconsin 8 RSA in violation of Section 22.921(b) of the Rules, and that TDS failed to disclose the existence of this prohibited ownership interest as required by Section 1.65 of the Rules. In support of its argument, Century states that ten of the thirteen wireline carriers (hereinafter "wireline applicants") who filed applications for the Wisconsin 8 RSA, including Century itself, and four additional wireline carriers with a presence in the Wisconsin RSA who did not file applications for the Wisconsin 8 RSA (hereinafter "wireline carriers"), entered into a post-filing, pre-lottery, partial settlement agreement. This partial settlement agreement, the Wisconsin RSA Settlement Agreement, provided for the formation of the Wisconsin RSA 8 Partnership, and for the substitution of the Wisconsin RSA 8 Partnership as the applicant should one of the applications of the ten wireline applicants win the lottery. While TDS is not a party to the Wisconsin RSA Settlement Agreement, Century points out, one of the four wireline carriers that never filed an application, and is a party to the settlement agreement is UTELCO, Inc. (UTELCO). TDS owns 49% of the stock of UTELCO.

3. Century argues that, as result of the settlement agreement, all of the signatories hold a one-fourteenth *pro rata* interest (or 7.143%) in each of the ten applications filed by the wireline applicants for the Wisconsin 8 RSA. Therefore, Century contends, since TDS has a 49% interest of UTELCO's 7.143% interest (or 3.5%) in each of the ten applications filed by the wireline applicants, in addition to its own application, TDS has a prohibited ownership interest in more than one application for the same RSA. In addition, Century argues that despite the existence of this prohibited ownership interest, TDS did not disclose this fact to the Commission. For these reasons, Century concludes that TDS's application is defective, and must be dismissed.

4. In opposition, TDS states that settlement agreements do not create "ownership interests" which are subject to Section 22.921(b) of the Rules. TDS states that the participants in settlement agreements do not acquire *pro rata* interests in each others' applications as argued by Century. TDS states that to construe settlement agreements as creating "ownership interests" would effectively preclude all wireline partial settlements, because all the parties to a settlement agreement would hold prohibited interests in each of the other parties' applications. TDS further states that the Wisconsin RSA Settlement Agreement, by its terms, cannot create rights or obligations for its signatories unless one of the wireline applicants wins the lottery. None of the wireline applicants won the lottery, and therefore, TDS contends, the signatories to the settlement agreement do not have any ownership interests in the applications filed by the wireline applicants.

5. In addition, TDS states that it was under no obligation to report the fact that UTELCO entered into the Wisconsin RSA Settlement Agreement. TDS states that it listed its ownership interests in UTELCO in its amendments to its own application in compliance with our Rules.[2] However, TDS contends that since the Wisconsin RSA Settlement Agreement did not change the information in TDS's application, TDS had no obligation to report its existence.

### III. DISCUSSION

6. Section 22.921(b) of the Rules provides, in pertinent part, that:

> No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

7. The prohibition contained in Section 22.921(b) of the Rules applies only to a party who has an ownership interest in more than one application filed for the same RSA. In this case, TDS does not have any interest in the applications filed by the other wireline applicants. Contrary to Century's argument, the Wisconsin RSA Settlement Agreement did not give each signatory to the agreement a *pro rata* ownership interest in each of the ten applications filed by the wireline applicants. The wireline applicants did not agree to give the members of the

Wisconsin RSA Settlement Agreement an interest in their own applications. Instead, the agreement contained a provision providing that in the event that one of the wireline applicants won the lottery, that wireline applicant would substitute the Wisconsin 8 Partnership as the winning applicant. Since none of the settling applicants won the lottery, the contingent clause never became effective and, thus, no substituted application was ever filed including UTELCO (and, thus, TDS) as a minority partner. In addition, while TDS has an interest in UTELCO, UTELCO did not file an application for the Wisconsin 8 RSA. Thus, within the meaning of Section 22.921(b), TDS does not hold ownership interests in more than one application for the Wisconsin 8 RSA, and therefore, we find that no violation of Section 22.921(b) of the Rules has occurred. Moreover, the Commission has consistently stated that it favors settlement agreements among wireline applicants. *See* Section 22.29 of the Rules. We agree with TDS that to construe Section 22.921(b) of the Rules to prohibit the settlement agreement in this case would be inconsistent with the Commission's policy of favoring full or partial settlements among wireline RSA applicants. *See Requirements for Pre - filing Settlement Agreements by Wireline Applicants in RSA's*, 64 Rad. Reg. (P&F) 1637, 1638 (1988).

8. Section 1.65 of the Rules imposes on each applicant the obligation to maintain the continuing accuracy and completeness of its pending application. This includes the responsibility to disclose the details of settlement agreements involving the applicant. *See Requirements for Pre - filing Settlement Agreements by Wireline Applicants in RSA's, supra*. However, in the case before us, TDS was not a party to the settlement agreement, and UTELCO was not an applicant. In these circumstances, TDS was not obliged to report the existence of the Wisconsin 8 Settlement Agreement.

9. Accordingly, we find that Telephone and Data Systems, Inc. is qualified to hold the non-wireline cellular license for the Wisconsin 8 - Vernon RSA. We also find that grant of the application will serve the public interest, convenience and necessity.

## IV. ORDERING PARAGRAPHS

10. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of Telephone and Data Systems, Inc., as amended, File No. 10209-CL-P-715-B-88 IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Wisconsin 8 - Vernon RSA and is also conditioned upon coordinating with current or future co-channel licensee(s) in the areas outside the RSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull its 39 dBu contours to eliminate any interference due to an extension.

11. IT IS FURTHER ORDERED that the Petition to Deny filed by Century Cellunet, Inc. IS DENIED.

12. IT IS FURTHER ORDERED that all wireline cellular applications in the Wisconsin 8 - Vernon RSA, other than the application of Telephone and Data Systems, Inc. ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

### FOOTNOTES

[1] On September 21, 1989, Century filed a Motion for Leave to File Supplemental Declaration of Fred Englade, Century's Manager for RSA Development. Section 1.45 of the Rules provides that additional pleadings may be filed only if authorized by the Commission. Because we find that the Declaration provides no new pertinent facts, we deny Century's Motion.

[2] On April 17, 1989, TDS filed an amendment to its application to update the information regarding the ownership of TDS, and of its subsidiaries and affiliates with interests in Part 22 facilities. On June 29, 1989 TDS filed an additional amendment to its application to report its financial qualifications to build and operate its proposed system in the RSA, and to further update its ownership information and eligibility to apply for the authorization.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**FOIA Control No. 88-205**

In the Matter of

Charles P. Pascal

On Request for Inspection
of Records

**ERRATA**

**Released: November 13, 1989**

1. By *Memorandum Opinion and Order*, FCC 89-265, adopted August 4, 1989, released August 17, 1989, the Commission determined that certain records in the Amateur Radio license file of Mr. Charles P. Pascal would not be made available in response to Mr. Pascal's request under the Freedom of Information Act (FOIA). 5 U.S.C. § 552. Paragraph 3 of that *Memorandum Opinion and Order* is corrected as set forth below:

> As to the records submitted in 1986, the documents were not submitted to the Commission under circumstances from which it could be inferred that the source expected confidentiality. *See* S. Conf. Rep. No. 1200, 93rd Cong., 2d Sess. 13, *reprinted* in 1974 U.S. Code Cong. & Ad. News 6285, 6291. As to the documents submitted after 1986, however, we have determined that, with three exceptions, they are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(D). These documents will be withheld in their entirety.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

MCI Airsignal, Inc. — File No. 21822-CD-P/L-4-85

For authority to construct additional facilities in the Public Land Mobile Service on Frequency 152.15 MHz for Station KKG411 at Decatur, Aubrey, and Burleson, Texas

MCI Airsignal, Inc. — File No. 20777-CD-P/L-2-85

For authority to construct additional facilities in the Public Land Mobile Service on Frequency 152.15 MHz for Station KKG411 at Weatherford, Texas

Communications Sales & Service, Inc. — File No. 21978-CD-P/L-1-85

For authority to construct a new facility in the Public Land Mobile Service on Frequency 152.15 MHz at Bridgeport, Texas

## MEMORANDUM OPINION AND ORDER

**Adopted: October 11, 1989; Released: November 13, 1989**

By the Chief, Mobile Services Division:

### I. INTRODUCTION

1. The captioned applications were listed as mutually exclusive in *Public Notice*, Report No. PMS-85-23 (June 26, 1985). Within 30 days of this *Public Notice*, MCI Airsignal, Inc. filed, pursuant to Section 22.33 (c)(1) of the Commission's Rules, a Request for Comparative Hearing between its captioned applications and the captioned application of Communications Sales & Service (CSSI).[1] CSSI filed an Opposition to Request for Comparative Hearing, and MCI Airsignal, Inc. filed a reply.

2. On September 30, 1985, MCI Airsignal filed amendments to its captioned applications that eliminated the interference between its proposed Weatherford location, its proposed Aubrey and Burleson locations, and CSSI's proposed Bridgeport location. Thereafter, only MCI Airsignal's Decatur proposal remained mutually exclusive with CSSI's Bridgeport proposal. Additionally, on December 24, 1986, the application for assignment of license for MCI Airsignal's Station KKG411 to Mobilecomm of Texas, Inc. (Mobilecomm) was granted, and Mobilecomm is now prosecuting the Decatur application.[2] Consequently, we consider herein only the request for comparative hearing between Mobilecomm's Decatur application and CSSI's Bridgeport application. [3]

### II. BACKGROUND

3. In support of its request for comparative hearing, Mobilecomm asserts that it has several existing transmitting locations on frequency 152.15 MHz and a control facility on frequency 72.94 MHz in the Dallas/Fort Worth, Texas area. Mobilecomm asserts that the Decatur facility is within 40 miles of its existing Location No. 14. In addition, Mobilecomm states that it has filed a number of other applications to modify existing facilities on frequency 152.15 MHz and to add a control facility on frequency 72.94 MHz. Mobilecomm argues that these proposals demonstrate that it has sufficient subscriber demand to justify expansion of its system in the Dallas/Fort Worth area. Mobilecomm concludes that a comparative hearing is justified because industry and population growth north of Dallas have created the need for wider area, reliable paging services, and that a sizable community of interest exists between the existing service area and the proposed expanded area of coverage.

4. CSSI contends that the Mobilecomm request includes only one very general statement that "recent area industry growth and, therefore, increase in population north of Dallas has created a need. . . . " (Request at 5). CSSI alleges that this contention is unsupported and insufficient to make a demonstration of need, and thus, the request fails to demonstrate demand by existing customers for wide-area service.

5. CSSI also argues that a comparative hearing is not justified because Mobilecomm's request entails the expansion of paging service on a channel allocated to two-way use and therefore, is not in the public interest. CSSI asserts that Mobilecomm's application seeks to expand geographically its paging service on the two-way channel 152.15 MHz. It submits that the proposal involves only one control channel, which is useful only for paging, and does not specify in its application the control/repeater link it will use among the base stations generally necessary to provide two-way service. CSSI argues that granting the request for a comparative hearing based on expansion of a paging system over a contested two-way channel would encourage tacit conversion of a frequency pair to paging usage. This result, submits CSSI, is contrary to Commission policy on spectrum efficiency regarding the use of two-way channels set forth in *Paging Mobile Radio Services*, 95 FCC 2d 769, 823 (1983). CSSI submits that if Mobilecomm's request for hearing is granted, the Commission should include an issue as to Mobilecomm's use of a two-way frequency for paging.

6. Mobilecomm replies that its request does demonstrate sufficient demand as required by Section 22.33 (c)(1). Mobilecomm submits that its request documents that it filed seven applications to modify and add facilities on the same frequency, apart from this proposal, to expand its system. Mobilecomm also submits that its request mentions that (1) the expansion is in response to the requirements of its present customers for service in the area applied for, and that (2) the proposal will be integrated into the existing system and provide needed additional service to its existing customers.

## III. DISCUSSION

7. After a thorough review of the pleadings and the applications as amended in this case, we conclude that Mobilecomm has failed to satisfy the burden of demonstrating demand by existing subscribers for expanded service and thus has failed to show that it is eligible for a comparative hearing. It is established Commission policy that lottery selection among mutually exclusive applicants is the general rule, and that exceptions to the rule are to be strictly construed and enforced. *See, e.g., Mobile Phone of Texas*, Mimeo 2728 (released February 22, 1985). Section 22.31 (c)(1) requires first that the applicant requesting a comparative hearing satisfy certain geographical and frequency requirements. *Supra*, at note 1. These requirements have been satisfied; the proposed transmitter at Decatur is located within 40 miles of an existing location and is for the same frequency.

8. However, Section 22.33 (c)(1) further requires that a requesting applicant demonstrate a demand by existing subscribers for expanded service. We find the Mobilecomm showing with respect to this requirement to be insufficient. The general assertions concerning (1) the need created by the population growth north of Dallas for wide area paging service, (2) present customers' requirement for efficient service in this area, and (3) the sizable community of interest between the existing service area and the proposed expanded area of coverage are not sufficiently specific to satisfy the demand showing required by the rule. We have previously denied hearing requests on the ground that they did not submit specific information which is necessary to comply with Section 22.33 (c)(1). *See Bay Springs Telephone Co.*, 3 FCC Rcd 2133 (Mob. Serv. Div. 1988) (mere assertion that all of subscribers contacted, signed written requests for proposed expanded service found unpersuasive); *Radio Call Company of Long Island, Inc.*, 2 FCC Rcd 6772 (Mob. Serv. Div. 1987) (mere representation that expanded service is needed in response to subscriber demand is insufficient); *Speed Call, Inc.*, 2 FCC Rcd 6530 (Mob. Serv. Div. 1987) (subscriber survey forms submitted to indicate demand were found insufficient).

9. In *RAM Communications of Michigan, Inc*, 51 Fed. Reg. 21802 (Com. Car. Bur. 1986), the Common Carrier Bureau found that a comparative hearing had been justified when "specific information as to numbers of units, area covered and the purpose to be served by the present application" had been produced. No such evidence has been presented in this case.[4] Similarly, in *Southwestern Bell Telephone Company*, 51 Fed. Reg. 22353 (Com. Car. Bur. 1986), the Bureau granted a request for comparative hearing when specific data as to number of existing subscribers and the number of subscribers requesting extended coverage were submitted. Mobilecomm has not submitted such evidence in this case. Therefore, with respect to its proposed Decatur location, we deny the request of Mobilecomm to designate a comparative hearing.[5]

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that the request for comparative hearing filed by MCI Airsignal (successor in interest, Mobilecomm of Texas, Inc.) is hereby DENIED.

11. IT IS FURTHER ORDERED that a lottery between the Mobilecomm application for an additional facility at Decatur, Texas and the captioned application of Communications Sales & Service, Inc. shall be held at a time and place to be specified in a subsequent public notice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt,
Chief, Mobile Services Division
Common Carrier Bureau

### FOOTNOTES

[1] Section 22.33 (c)(1) of the Commission's rules states that a mutually exclusive applicant is eligible to request a comparative hearing in lieu of the random selection procedure if it is:

> "an applicant proposing to add one or more transmitter location to an authorized station on the same frequency or frequencies for which it is already licensed and within 40 miles of existing transmitter location on those frequencies, and when the applicant demonstrates in its application a demand by its existing subscribers for the expanded service. . . ".

[2] *See* Public Notice, PMS-87-13-A (released December 24, 1986). On March 17, 1988, Mobilecomm withdrew the applications for the proposed Aubrey and Burleson facilities.

[3] The MCI Airsignal application for the Weatherford facility, File No. 20777-CD-P/L-2-85, was granted November 6, 1985.

[4] Although Mobilecomm described each of its originally proposed facilities, including Decatur, as being within 40 miles of its existing Location No. 14, its request fails to describe specifically the area to be covered.

[5] Because we have denied the request on the basis that Mobilecomm did not meet the requirements of Section 22.33 (c)(1) of the rules, we need not address the public interest issue raised by CSSI regarding paging on a two-way channel.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**October 13, 1989**

**LETTER**

**Released: November 13, 1989**

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED 8210-EJS
C3-749

Gerald Fitzgerald, President
Metro Program Network, Inc.
Licensee, Station KOCR(TV)
605 Boyson Road, N.E.
Cedar Rapids, Iowa 52402

Dear Mr. Fitzgerald:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a FORFEITURE to Metro Program Network, Inc., licensee of Station KOCR(TV), Cedar Rapids, Iowa, for its willful and repeated violation of Section 301 of the Communications Act of 1934, as amended, and Section 73.1620(a) of the Commission's Rules. Pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended, you are hereby advised of the following:

An inspection of the facilities of Station KOCR(TV), Cedar Rapids, Iowa, on March 1, 1988, by the Commission's Field Operations Bureau revealed that you constructed facilities at substantial variance from those specified in your construction permit (BPCT-830314KL) dated May 13, 1985. Specifically, the permit authorized Station KOCR(TV) to construct at geographical coordinates $42^0$ 06' 25" North Latitude, $92^0$ 08' 05" West Longitude. The findings of the FOB inspection revealed, *inter alia*, that your facility was actually constructed at geographical coordinates $42^0$ 02' 43" North Latitude, $91^0$ 38' 51" West Longitude, or approximately 40.9 kilometers (25.4 miles) from the authorized site. A review of the Commission's records indicates that you did not have Commission authorization to construct the facility at that location.

During the inspection you admitted that the station began carrying full programming on February 1, 1988. Thus, programming commenced prior to KOCR(TV)'s obtaining either a modification of its construction permit or a license to cover the facilities actually constructed. By telegram dated March 25, 1988, the Chief, Video Services Division, advised you to cease all operation not later than 3:00 a.m. local time, March 26, 1988, due, *inter alia*, to unauthorized operation in violation of Section 301 of the Communications Act, as amended. Section 301 requires that broadcast stations be operated in accordance with the requirements of the Communications Act of 1934, as amended, and with a license granted by the Commission.

Section 73.1620(a) of the Commission's Rules states as follows:

> Upon completion of construction of an AM, FM, or TV station *in accordance with the terms of the construction permit, the technical provisions of the applications*, the rules and regulations and the applicable engineering standards, program tests may be conducted . . . .(Emphasis supplied.)

Because your facility was not constructed in accordance with your application or the terms of your construction permit, you were not entitled to operate pursuant to program test authority. Thus, it appears that you willfully and repeatedly violated Section 301 of the Communications Act and Section 73.1620 of the Commission's Rules by operating your station from at least February 1, 1988, until March 26, 1988. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, you are hereby advised of your APPARENT LIABILITY for a FORFEITURE of TWENTY THOUSAND DOLLARS ($20,000.00) for willful and repeated violation of the Communications Act and the aforementioned rule between the dates specified above. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2)(B) of the Communications Act of 1934, as amended.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Attachment

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ROCK HILL
TELEPHONE COMPANY

Request for Emergency Temporary
Waiver of the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

**ORDER**

**Adopted: October 6, 1989; Released: October 6, 1989**

By the Chief, Common Carrier Bureau:

1. In an Order released May 31, 1989,[1] the Chief, Common Carrier Bureau, granted Rock Hill Telephone Company (Rock Hill)[2] a three and one-half month extension of time in which to complete equal access conversion.[3] As a result, Rock Hill Telephone was scheduled to complete equal access conversion by September 30, 1989.

2. On September 28, 1989, Rock Hill filed a request for an emergency temporary waiver of the Commission's equal access implementation requirements to allow it until October 28, 1989, to complete conversion. In support of this request, Rock Hill states that it cannot complete the conversion process as scheduled because virtually all company resources and manpower have been assigned to restore basic service to those areas that suffered destruction from Hurricane Hugo. Rock Hill states that it has notified all of the interexchange carriers (IXCs) affected by this delay, and that all of them find an extension of four weeks acceptable.

3. The Commission's *ITC Equal Access Order*[4] contemplates that special circumstances may warrant independent telephone company conversion schedules that are longer than the standard three-year timetable.[5] Thus, the Order includes a waiver provision for those independent telephone companies that "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[6] The Commission's rules also provide for the grant of waivers upon a showing of good cause.[7]

4. We find that Rock Hill has shown good cause for grant of the additional time that it seeks for completion of equal access implementation. The need to devote resources to repairing damage caused by Hurricane Hugo so that basic service can be restored clearly justifies the brief additional period requested by Rock Hill for conversion to equal access. We also note that all of the affected IXCs view a four week extension as acceptable.

5. Accordingly, IT IS ORDERED, that the request of Rock Hill Telephone Company for an emergency temporary waiver of our equal access implementation requirements until October 28, 1989, IS GRANTED.[8]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] In the Matter of Rock Hill Telephone Company and Home Telephone Company, and The Chester Telephone Company, Requests for Temporary Waiver of the Commission's Equal Access Implementation Plan for Independent Telephone Companies, 4 FCC Rcd 4588 (1989).

[2] Rock Hill is a certificated local exchange carrier providing service in certain areas of South Carolina.

[3] Telecommunications Systems, Inc. (TSI) is the interexchange carrier that requested equal access service from Home Telephone. TSI was subsequently purchased by SouthernNet.

[4] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[5] The Commission has also found that a more rapid implementation schedule may be required in certain circumstances. *See* In the Matter of Petition of MCI Telecommunications and GTE Sprint Communications Regarding the Validity of Connecticut Statute and Decisions of the Connecticut Department of Public Utility Control Relating to Unauthorized Intrastate Traffic, 1 FCC Rcd 270 (1986), at paras. 34-39.

[6] *See ITC Equal Access Order* at para. 50.

[7] Section 1.3 of the Commission's Rules, 47 CFR § 1.3.

[8] This action is taken pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 CFR §§ 0.91(h) and 0.291.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

BELLSOUTH TELEPHONE COMPANIES — Transmittal Nos. 256, 267, and 275

Tariff F.C.C. No. 4

**ORDER**

**Adopted: October 26, 1989; Released: October 27, 1989**

By the Chief, Common Carrier Bureau:

1. On July 10, 1989, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 256, which proposes various modifications to the terms and conditions of BellSouth's interstate access tariff. On July 25, 1989, MCI Telecommunications Corporation (MCI) petitioned to reject or, in the alternative, suspend and investigate five specific changes proposed by BellSouth.[1] BellSouth subsequently filed a reply to MCI's petition on August 4, 1989.[2] The revisions proposed by Transmittal No. 256, as modified by Transmittal No. 267, and further modified by Transmittal No. 275, are scheduled to become effective on October 30, 1989.

2. In Transmittal 256, BellSouth proposes, *inter alia*, the following modifications to its interstate access tariff: (1) requiring that quarterly reports be the sole method for interexchange carriers (ICs) to update their percentage of interstate usage (PIU) factors; (2) changing the daily percentage rate for late payment penalty interest and overcharge credit interest from 0.000333 to 0.000329; (3) replacing the word "unusable" with the word "inoperative" in Section 2.4.4(A), which governs the determination of credit allowances for customer service interruption; (4) requiring ICs to retain data justifying Carrier Common Line (CCL) charges for a period of one year, as well as requiring ICs to provide quarterly reports to assess CCL charges on BellSouth's IC customers for 700, 800, and 900 Service calls rather than report actual monthly usage; and (5) making "ratcheted" high capacity service credit factor changes effective from the beginning of the month in which the ratcheting occurs.[3]

3. MCI first asserts that BellSouth's proposal to utilize quarterly jurisdictional reports as the only mechanism for updating its PIU factor request will lead to over-or underbilling since BellSouth personnel will no longer update the PIU billing factor when processing access service order requests. MCI Petition at 2-3. Second, MCI argues that BellSouth's proposed modification of the daily percentage rate for late payment penalty and overcharge credit interest is actually a rate increase not supported by any cost support data. *Id.* at 3-4. MCI next argues that the word "unusable" should be retained in BellSouth's tariff and defined so as to ensure that ICs will receive a credit whenever service is supplied by BellSouth which does not technically conform with its tariff. *Id.* at 4-5.

4. MCI further states that BellSouth has failed to demonstrate a need to require ICs to file quarterly reports of the percentage of 700, 800, and 900 Service for which they claim CCL credits, and that the proposed one year data retention requirement is one-sided and unreasonable. *Id.* at 5, 7. Finally, MCI alleges that under BellSouth's proposal to make all ratcheting credit factor changes effective at the beginning of the month, BellSouth would no longer be required to prorate changes in the ratcheting credit factors on its access bills to ICs, which would lead to the ICs being double-billed and overcharged. *Id.* at 9.

5. BellSouth replies first that MCI has not demonstrated how its proposal would lead to inaccurate billing, that no method of updating PIU factors is totally accurate, and that its proposal, which would result in efficiencies for BellSouth, is no more inaccurate than the current method. BellSouth Reply at 2-3. Next, BellSouth asserts that a late penalty charge of 12 percent annually has been in effect since December 1988, that the rate remains 12 percent annually under the proposed modification, and that the modification will have no effect on its revenue requirement or rate of return. *Id.* at 4. With respect to credits for service interruption, BellSouth asserts that MCI is incorrect in assuming that substitution of the word "inoperative" for the term "unusable" will prevent a credit where service fails to meet the technical specification set forth in the tariff. *Id.* at 5. As to the quarterly CCL charge credit reports, BellSouth asserts that it adequately explained its reasons for revising the terms and conditions applicable to CCL charge credit reports for 700, 800, and 900 Service calls. *Id.* at 5-6. Finally, BellSouth states that MCI's argument regarding the proposed change to the ratcheted high capacity service credit factor overlooks the fact that when switched traffic is removed from the high capacity circuit during the month, an IC would receive a full month's ratcheting credit rather than a partial credit. *Id.* at 7-8.

6. On September 20, 1989, BellSouth filed Transmittal 267, which proposes to modify tariff language associated with credit allowances for CCL charges for 700, 800, and 900 Service traffic. Specifically, Transmittal 267 substitutes the one-year data retention language with language that requires the customer to "keep records from which the reported percentage credit can be ascertained." BellSouth Tariff F.C.C. No. 4, 2nd Revised Page 3-15 at Section 3.8.5(D). BellSouth claims that the language associated with audit procedures for verifying IC CCL credit claims in the event of a dispute has now been modified to maintain consistency with other tariff sections. BellSouth Tr. No. 267 Cover Letter at 1. On October 23, 1989, BellSouth filed Transmittal 275, which proposes to change the word "inoperable" to the word "unusable" in the section of its access tariff which addresses credit allowances for customer service interruption. BellSouth Tariff F.C.C. No. 4, 2nd Revised Page 2-24 at Section 2.4.4(A). In addition, BellSouth proposes a definition for "unusable service" in the access tariff's definition section. BellSouth Tariff F.C.C. No. 4, 1st Revised Page 2-56 at Section 2.6.

7. The Common Carrier Bureau has reviewed Transmittal 256, the description and justification supporting it, the pleadings, and Transmittals 267 and 275. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by BellSouth are patently unlawful so as to require rejection and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate BellSouth Telephone Companies, Tariff F.C.C. No. 4, Transmittal No. 256, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] MCI Petition To Reject, BellSouth Tr. No. 256, filed July 25, 1989 (MCI Petition).

[2] BellSouth Reply, filed Aug. 4, 1989 (BellSouth Reply).

[3] Ratcheting is a method of adjusting billing based on the number of switched access lines which are periodically added and deleted from the high capacity channel.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: October 31, 1989**

**FCC ANNOUNCES SECOND MEETING OF THE ONA JOINT CONFERENCE (CC Docket 88-2, Phase I)**

The Federal/State Joint Conference on Open Network Architecture (ONA) will convene its second meeting at 10:30 on Tuesday, November 14, 1989, at the Boston Copley Place Marriott, 110 Huntington Avenue, Boston, Massachusetts. The meeting will be open to the public, although participation is limited to Conference members.

The Joint Conference serves as an ongoing forum for state/federal cooperation to facilitate the development and implementation of ONA. The creation of a Joint Conference was initially announced in the Federal Communications Commission's *BOC ONA Order* (4 FCC Rcd 1 (1989)). Two FCC Commissioners and thirteen state commissioners serve as Conference members.

For further information contact Steven Gorosh, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 86-180**

In re Applications of

STANLY GROUP BROADCASTING, INC.
Denver, Colorado — File No. BPCT-860212KH

LOMAS DE ORO BROADCASTING CORPORATION
Denver, Colorado — File No. BPCT-860212KO

For Construction Permit
for a New Television Station

**ORDER**

**Adopted: September 29, 1989; Released: October 2, 1989**

1. The above-captioned applications for a new television station on Channel 50 in Denver, Colorado are mutually exclusive. In a decision, *Stanly Group Broadcasting, Inc.*, 3 FCC Rcd 5017 (Rev. Bd. 1988), the Review Board affirmed the ALJ's award of a construction permit to Lomas, and denied the competing applications filed by Stanly and Amador. On September 15, 1988, and September 16, 1989, respectively, Stanly and Amador filed applications for review of the Review Board's decision. The General Counsel, acting under delegated authority, approved a settlement agreement between Lomas and Amador whereby Amador agreed to dismiss its application and withdraw its Application for Review. *Stanly Group Broadcasting, Inc.*, FCC 89I-21 (March 13, 1989).

2. In order to avoid the expense of further litigation, Lomas and Stanly have entered into a settlement agreement that will terminate this adjudicatory proceeding. On April 10, 1989 Stanly filed a Request for Stay of Proceedings Pending Settlement Negotiations. Subsequently, on August 7, 1989, Stanly and Lomas filed a Joint Request for Approval of Agreement, which requests that the Commission approve the agreement, dismiss with prejudice Stanly's application, and grant Lomas' surviving application for UHF television Channel 50. A Supplement to Joint Request for Approval of Agreement, filed on August 8, 1989, by Lomas reported that it would be filing an amendment that would include a minor engineering change and requested that the Commission defer action on the Joint Request for a period not exceeding thirty days to permit Lomas to file the amendment. On August 17, 1989, the Mass Media Bureau filed Comments In Support of Joint Request for Approval of Agreement, As Supplemented.

3. Lomas filed a Petition for Leave to Amend on September 13, 1989, and a Supplement to Petition for Leave to Amend on September 19, 1989. On September 28, 1989, the Mass Media Bureau filed Comments on Petition for Leave to Amend, as Supplemented. In its petition, Lomas seeks to amend its application to propose a new transmitter site, on which construction may begin immediately, without the need for local zoning or other approval. Lomas also reports a change in the applicant's name (from Lomas de Oro Broadcasting Corporation to Golden Hills Broadcasting Corporation), slight changes in the distribution of voting stock, the addition of a director, the permanent move of one of Lomas' owners to Littleton, Colorado, and a new address and phone number for the applicant.

4. The parties request that the Commission approve the agreement, dismiss Stanly's application, and grant Lomas' amended application inasmuch as it is the sole remaining applicant in this case. Under the terms of the settlement agreement, Stanly will dismiss with prejudice its application and withdraw its Application for Review. As consideration for Stanly's promise to dismiss its application and withdraw its Application for Review, Lomas will pay Stanly $35,000 fifteen days after the grant of its application for television Channel 50 becomes final.

5. The settlement agreement will be approved. The Joint Request for Approval of Settlement Agreement, filed on August 7, 1989 and supplemented on August 8, 1989, complies fully with the provisions of 47 U.S.C. § 311(c) of the Communications Act and 47 C.F.R. § 73.3525(a) of the Commission's rules, which govern settlement agreements among competing applicants. Attached to the Joint Request is a copy of the settlement agreement between Lomas and Stanly. The Joint Request states that approval of the settlement agreement will serve the public interest by expediting the start of new UHF television service to Denver and by conserving the resources of the parties and of the Commission.

6. In accordance with section 311(c) of the Communications Act and section 73.3525(a) of the Commission's rules, the settlement agreement incorporates declarations under penalty of perjury from each party to the agreement. The statements certify that their respective applications were not filed for the purpose of entering into or carrying out a settlement agreement, that approval of the settlement agreement will serve the public interest, and that, except as explicitly provided in the agreement, no consideration has been promised or paid to either Lomas or Stanly.

7. No objection has been received to Lomas' Petition for Leave to Amend. Based on its review of the amendment, as supplemented on September 19, 1989, the Mass Media Bureau supports the petition for leave to amend. Lomas has furnished a site certification and sufficient information to establish that its engineering amendment complies fully with the Commission's technical requirements. Accepting the amendment reporting minor changes in the applicant's ownership structure and engineering proposal will not require the addition of any new issues or parties, will not prejudice any party to this proceeding, and will expedite resolution of this adjudicatory proceeding. Lomas' petition for leave to amend is supported by good cause, and therefore, may be granted.

8. ACCORDINGLY, IT IS ORDERED, Pursuant to delegated authority under 47 C.F.R. § 0.251(f) of the Commission's rules, that the Petition for Leave to Amend, filed on September 13, 1989 and supplemented on Sep-

tember 19, 1989, by Lomas de Oro Broadcasting Corporation IS GRANTED; and the attached amendment, as supplemented, IS ACCEPTED.

9. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement, filed on August 7, 1989 and supplemented on August 8, 1989, by Lomas de Oro Broadcasting Corporation and Stanly Group Broadcasting, Inc. IS GRANTED; that the attached settlement agreement IS APPROVED; that the application filed by Stanly Group Broadcasting, Inc. (File No. BPCT-860212KH) IS DISMISSED with prejudice; and that the application filed by Lomas de Oro Broadcasting Corporation (now Golden Hills Broadcasting Corporation) (File No. BPCT-860212KO) IS GRANTED.

10. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED as moot: (a) Application for Review, filed September 15, 1988, by Stanly Group Broadcasting; (b) Opposition to Stanly's Application for Review, filed October 3, 1988, by Lomas de Oro Broadcasting Corporation; and (c) Request for Stay of Proceedings Pending Settlement Negotiations, filed April 10, 1989, by Stanly Group Broadcasting, Inc.

11. IT IS FURTHER ORDERED, That the proceeding in MM Docket No. 86-180 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Diane S. Killory
General Counsel
By John I. Riffer
Associate General Counsel

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| AMHERST BROADCASTING, INC. | **BC DOCKET NO. 81-159** File No. BPH-9176 |
| HAMPSHIRE COUNTY BROADCASTING COMPANY, INC. | **BC DOCKET NO. 81-160** File No. BPH-9566 |

For a Construction Permit for a New FM Broadcast Station on Channel 265A at Amherst, Massachusetts

**ORDER**

**Adopted: October 27, 1989; Released: October 30, 1989**

1. The Commission granted the application filed by Hampshire County Broadcasting Company, Inc. *Hampshire County Broadcasting Company, Inc.*, 99 FCC 2d 608 (ALJ 1984), *affirmed*, 99 FCC 2d 600 (Rev. Bd. 1984), *recon. den.*, 100 FCC 2d 245 (Rev. Bd. 1985), *rev. den.*, FCC 86-100 (released March 30, 1986), *recon. den.*, 2 FCC Rcd 198 (1987). ABI appealed. The proceeding was remanded at the request of the Commission for consideration of new evidence. *Amherst Broadcasting, Inc. v. FCC*, No. 78-1066 (Nov. 19, 1987). On remand the Commission reaffirmed its grant of Hampshire's application. *Hampshire County Broadcasting Company, Inc.*, 3 FCC Rcd 6137 (1988), *recon. den.*, 4 FCC Rcd 5414 (1989).

2. Now before the Commission for consideration are a Joint Request for Approval of Settlement Agreement filed October 4, 1989 by Amherst Broadcasting, Inc. (ABI) and Hampshire; an Erratum filed October 11, 1989 by ABI and Hampshire; and Comments filed October 18, 1989 by the Mass Media Bureau.

3. Under the terms of the settlement agreement, ABI agrees to request the dismissal of its appeal pending in the Court of Appeals for the District of Columbia Circuit and the dismissal of its FM application. Hampshire, agrees to purchase the assets and acquire the license of Station WTTT(AM), Amherst, Massachusetts from ABI, subject to the approval of the proposed assignment by the Commission. In addition, a 49% interest in Hampshire will be transferred to a new participant in this proceeding, the Davis-Stebbins Broadcast Group. Hampshire's current stockholder's will retain a controlling 51% interest in the applicant. Any additional transaction which would effect a transfer of control would require further Commission approval pursuant to 47 U.S.C. § 310.

4. The Joint Request fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3535(a) that govern settlement agreements. Attached to the Joint Request are a copy of the agreement between Hampshire and ABI, together with declarations from the principals of Hampshire and ABI that their applications were not filed for the purpose of carrying out a settlement agreement. The agreement will serve the public interest by expediting the institution of a new FM service in Amherst, Massachusetts.

5. ACCORDINGLY, IT IS ORDERED, That pursuant to authority delegated under 47 C.F.R. § 0.251(f)(11), the Joint Request for Approval of Settlement Agreement filed October 4, 1989 by Hampshire County Broadcasting Company, Inc. and Amherst Broadcasting, Inc. IS GRANTED; that the attached agreement IS APPROVED; that the application filed by Amherst Broadcasting, Inc. (File No. BPH-9176) IS DISMISSED; that the application filed by Hampshire County Broadcasting Company, Inc. (File No. BPH-9566) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel
By John I. Riffer
Associate General Counsel

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-552**

In re Applications of

AMERICAN INDIAN BROADCAST GROUP, INC. File No. BPH-870921MB

For Construction Permit for a
New FM Station on Channel 270C1
in San Angelo, Texas

**Appearances**

*Robert S. Stone*, on behalf of American Indian Broadcast Group, Inc.; and *James W. Shook*, on behalf of Chief, Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN**

**Issued: November 3, 1989; Released: November 14, 1989**

## PRELIMINARY STATEMENT

1. This proceeding involves only the application of American Indian Broadcast Group, Inc. (American) for a new commercial FM radio station to serve the community of San Angelo, Texas on FM Channel 270C1. American remains the only party to the instant proceeding following the Presiding Judge's dismissal of the application filed by Southwest Texas FM Limited Partnership (Southwest) for failure to prosecute. *See Order*, FCC 89M-2264, released September 13, 1989.

2. When designating the applications of American and Southwest for hearing, the Chief, Audio Services Division, specified "air hazard" issues against both American and Southwest, in addition to the standard comparative issue. *American Indian Broadcast Group, Inc. (Hearing Designation Order)*, DA 88-1842, released January 11, 1989 (HDO). By *Order*, FCC 89M-1321, released May 3, 1989, the Presiding Judge granted American's Motion for Summary Decision as to the air hazard issue facing its application and resolved the issue in American's favor.

3. By *Order*, FCC 89M-1968, released July 26, 1989, the Presiding Judge designated the following issue against American, which had been left unresolved following American's dismissal from another proceeding before the Commission:

> To determine whether American Indian Broadcast Group, Inc. made written misrepresentations or lacked candor with the Commission in certifying to its financial qualifications, and if so, the effect thereof on its qualifications to be a Commission licensee.

The burdens of proof and proceeding on the added issue were placed on American, and the parties were directed to comply with the procedural schedule previously adopted by the Presiding Judge's ruling during the March 16, 1989 prehearing conference, as memorialized by *Order*, FCC 89M-863, released March 17, 1989. Pursuant thereto, American exchanged its Direct Case on August 28, 1989. A hearing was held before the Presiding Judge in connection with the above issue on September 11, 1989, following which the record was closed. American and the Mass Media Bureau filed proposed findings and conclusions on October 18, 1989. No replies have been filed.

## FINDINGS OF FACT

4. American was formed in July 1987 (Tr. 114). American filed 15 separate applications for FM construction permits between August 1987 and May 1988[1] (American Ex. 2, pp. 2-4; Mass Media Bureau Ex. 2). Each application was signed by Jack W. Bursack, who was the president and one third shareholder of American[2] (Tr. 114; Mass Media Bureau Ex. 2, p. 2; American Ex. 2, p. 3). At the time of signature, Bursack American's other shareholders consisted of Lynwood Eaton and Fritz Niggeler, each of whom owned one third of American. (*Id.*)

5. Bursack is president, director, general manager and a 98.6 percent shareholder of Smyrna Broadcasting Corporation (SBC), licensee of WSVT, Smyrna, Tennessee (Tr. 116). Bursack became associated with SBC in 1976, when the construction permit application for WSVT was filed (Tr. 117). At that time, Bursack's ownership share in SBC was 33 percent (Tr. 116). Bursack's share subsequently increased to 50 percent and then to 98.6 percent. (*Id.*) Bursack has occupied a management position at WSVT since 1981, when WSVT was first licensed (American Ex. 2, p. 1).

6. From his conversations with Robert Sticht, Bursack was aware that a budget had been prepared for WSVT prior to the time of the filing of the SBC application (Tr. 118-120). He also knew that, prior to filing its application, SBC had obtained a loan commitment letter from two local landowners who were also 33 percent shareholders in SBC (Tr. 121-123). Bursack recalls seeing the loan commitment letter but does not recall reviewing the SBC application before it was filed (Tr. 118, 123). The SBC application was not prepared or signed by Bursack (Tr. 118). Prior to the filing of the American applications, Bursack had never personally prepared a construction permit application (Tr. 103).

7. Eaton and his wife, Bertha A. Eaton, own "In the Pink of Northborough," doing business as Eaton Limited (Eaton Limited). Eaton Limited is a women's clothing retailer (Tr. 156-157, 185; American Ex. 3, p. 6). The business has three outlets and has operated since 1972 (American Ex. 3, pp. 3-5). Eaton is also president and 50 percent owner of Eaton Farm Products, a candy manufacturer and retailer (American Ex. 3, p. 6; Tr. 185). Eaton Farm Products has operated since 1973 (American Ex. 3, p. 3). As of 1988, Eaton is also the licensee of AM station WCOR, Lebanon, Tennessee (Tr. 181). Prior to the submission of the American applications in 1987, Eaton had not been a party to a broadcast application and had not reviewed FCC Form 301 (Tr. 181, 183).

8. Bursack first met Eaton through a mutual friend in 1983 or 1984 (Tr. 108, 175). On that occasion, Bursack stayed at the Eaton residence for several days (Tr.

110-111, 176). Thereafter, Bursack visited Eaton's properties on one other occasion prior to the formation of American (Tr. 111, 176). On both visits, while staying at the Eaton residence, Bursack observed the extent of the Eaton's properties, which included the family residence, the family farm, and the above-described clothing store, and candy manufacturing facilities. (*Id.*). Bursack and Eaton had collaborated in an effort to develop a diet candy. However, an acceptable product was never developed (Tr. 114-115, 176).

9. Bursack first met Niggeler in 1970 (Tr. 112). Their relationship was social in nature (Tr. 115-116). Eaton and Niggeler did not become aquainted until July 1987, when American was organized (Tr. 177-178). Prior to the formation of American in July 1987, neither Bursack nor Eaton had had any business dealings with Niggeler (Tr. 116, 180).

10. In the early summer of 1987, Bursack and Niggeler decided to file applications for fourteen FM construction permits in various markets in the United States made available through FCC Docket 80-90 (American Ex. 2, p. 1; Tr. 129). The markets chosen were culled from a list of FM channels Bursack obtained from Timothy Brady, Esquire, an attorney who practices before the FCC (American Ex. 2, p. 1; Tr. 103, 129). To secure funding for the project, Bursack contacted Eaton and asked him to join Bursack and Niggeler as an equal (one-third) owner of American and to provide a loan commitment to American in the amount of $4,200,000 (American Ex. 2, p. 2; Tr. 129, 181-182).

11. Prior to requesting Eaton to join the venture, Bursack determined that the cost of construction of each of the desired stations would range from $100,000 to $450,000 (American Ex. 2, pp. 2-3; Tr. 130-131). In reaching the noted figures, Bursack consulted with several engineers and took into account the cost of a tower, studio, land for the tower and studio, equipment other than the tower, employees, and application preparation, including engineering (Tr. 132-139). He did not factor in the cost of an attorney because he did not know that an attorney would be needed (Tr. 133).

12. Bursack averaged the cost of the fourteen proposed stations and arrived at an average cost of a little more than $200,000 per station (Tr. 130). To ensure that he had adequately provided for the overall cost of the project, Bursack determined that American should budget the proposed costs at $300,000 per station, for a total of $4,200,000 (American Ex. 2, p. 2; Tr. 130-131). Bursack informed Eaton of the amount needed and explained how the amount was calculated (American Ex. 2, p. 2).

13. By letter dated August 3, 1987, Bursack asked Eaton to furnish a commitment in the amount of $4,200,000 (American Ex. 2, p. 4). By letter dated August 6, 1987, Eaton and his wife committed to lend American $4,200,000 and represented that they would fulfill their commitment by liquidating fixed assets that they owned jointly (American Ex. 2, p. 7). Shortly thereafter, Eaton and his wife supplemented their commitment by supplying Bursack with their personal financial statement (American Ex. 2, p. 3; Tr. 149). The financial statement shows that, as of August 6, 1987, Eaton and his wife had a net worth of slightly more than $7,000,000 (American Ex. 1, pp. 8-9). However, it also shows that the Eatons' net liquid assets totalled less than $125,000. (*Id.*).

14. Bursack and Eaton believed that a showing of sufficient net worth would adequately demonstrate American's financial qualifications (American Ex. 2, pp. 2-3; American Ex. 3, p. 2; Tr. 144, 182-183). They did not believe that they needed to demonstrate the availability of net liquid assets sufficient to meet the projected costs (American Ex. 2, p. 3; American Ex. 3, p. 2; Tr. 145, 183). Bursack obtained his understanding of the FCC's requirements through casual conversations with Brady (American Ex. 2, pp. 2-3; Tr. 104). Eaton obtained his understanding from Bursack (Tr. 183).

15. Eaton did not obtain an appraisal of his non-liquid assets prior to the completion of the financial statement (Tr. 188-189). Eaton determined the value of the business, which represented the bulk of the Eaton's net worth, by multiplying the gross sales figures of the businesses by a factor of six (American Ex. 3, p. 4; Tr. 186). Eaton believed this valuation was appropriate because of an inquiry he received concerning a possible sale of the candy business (Tr. 186). Eaton also personally determined the value of their real property (Tr. 188-191). That property consisted of a personal residence, his interest in the family farm, the candy plant, and one of the clothing stores. Eaton believed his valuations were appropriate because of his experience as a licensed real estate broker and because of conversations with other area real estate brokers (Tr. 191). Eaton did not tell Bursack how the values of the various properties and businesses were determined (Tr. 187). However, from his observations of the Eaton properties, Bursack believed that Eaton's valuations were accurate (Tr. 152).

16. After receiving the Eatons' loan commitment, Bursack began to fill out American's construction permit applications (American Ex. 2, p. 3). He personally completed each application, except for the technical portions, without assistance from an attorney. (*Id.*). Moreover, Bursack completed each application without reviewing the instructions for FCC Form 301. (*Id.*). Bursack had obtained one blank FCC Form 301 application, but no instructions, either from Brady or from a consulting engineer. (*Id.*; Tr. 97). Bursack made additional copies of the application form from the one copy he obtained (Tr. 97). From his conversation with Brady, Bursack believed that he did not need an attorney to fill out the application (Tr. 103).

17. On March 2, 1989, American obtained a bank letter from First American National Bank, located in Mt. Juliet, Tennessee (Mass Media Bureau Ex. 2). Therein, it was noted that American had 13 FM applications pending and that the projected costs for the proposed stations was $2,816,401.40. (*Id.*). Subject to various caveats, the bank expressed a willingness to extend a line of credit in the amount of $3,600,000. (*Id.*).

## CONCLUSIONS

18. The financial certification issue against American was specified in order to determine whether the applicant engaged in misrepresentations or lacked candor when it certified its financial qualifications in the fifteen applications filed between August 1987 and May 1988. It is well established that, where an applicant files multiple applications, the applicant must be able to demonstrate that it is financially qualified as to all pending applications. *George Edward Gunter*, 60 RR 2d 1662, 1664 (Rev. Bd. 1986).

19. In *Northampton Media Associates*, 4 FCC Rcd 5517 (1989) (Northampton), the Commission was faced with the question whether documentation supporting the attestation of financial qualifications must exist at the time of certification. The Commission held that an applicant may rely upon subsequently generated documents "provided that the applicant actually had a reasonable assurance of adequate funds at the time of certification." *Northampton*, 4 FCC Rcd at 5519. To provide reasonable assurance, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs and must provide substantial and reliable evidence showing sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue. Where the source of funds is a person as opposed to a financial institution, it is necessary to show that the person had the necessary financial resources to fund the project at the time of certification. *Id.*

20. Here, although American engaged in serious and reasonable efforts to determine the costs of construction and operation, it did not have reasonable assurance of sufficient net *liquid* assets. American's certifications were based on the *non - liquid* assets of one of its principals. Its reliance on non-liquid assets was inaapropriate because the valuations of those assets were not supported by a valid appraisal. *Opal Chapwell*, 4 FCC Rcd 1215 (1989); *Rose Broadcasting Company*, 68 FCC 2d 1242, 1246 n.9 (1978); *Kaye - Smith Enterprises*, 98 FCC 2d 675, 678, *recon. denied*, 98 FCC 2d 670 (Rev. Bd. 1984), *review denied*, FCC 85-192, released April 19, 1985. Thus, American did not establish that it was financially qualified at the time of its certifications.

21. However, considering the circumstances surrounding the certifications, it cannot be concluded that American deliberately misrepresented facts to or lacked candor with the Commission. Misrepresentations involve false statements of fact made with an intent to deceive. A lack of candor involves concealment, evasion, and other failures to be fully informative. Both represent deceit; they differ only in form. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). "[T]he 'bare existence of a mistake' in an application, 'without any indication that the [applicant] meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation . . . .'" *High Country Communications*, 4 FCC Rcd 6237, 6238 (1989), *quoting Kaye - Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979). Carelessness and mistakes of law do not constitute misrepresentation. *Gary D. Terrell*, 59 RR 2d 1452 (Rev. Bd. 1985).

22. The evidence establishes that Bursack mistakenly believed that an applicant only needed "adequate resources" to satisfy the Commission's requirements and serve as a basis for certifying American's financial qualifications. In so concluding, Bursack did not distinguish between liquid and non-liquid assets. Bursack came to this belief through casual conversations with an attorney who practiced before the Commission, his own misreading of FCC Form 301, and his failure to obtain and read the instructions to the form. Further, Bursack did not understand that if non-liquid assets were the basis of the certification, the valuations of those assets had to be supported by a valid appraisal. However, in this regard, Bursack had some knowledge of the Eatons' financial situation, having seen for himself the extent of the Eatons' properties. Moreover, he had a long-standing personal relationship with the Eatons. Thus, when Bursack obtained the Eatons' promise to loan American up to $4,200,000 and to raise that money by the sale of fixed assets, if necessary, Bursack had a good faith belief that the Eatons could meet and would honor their financial commitment. Consequently, it is concluded that Bursack did not intentionally misrepresent facts to or lack candor with the Commission when he certified that American was financially qualified to construct and operate the proposed FM stations. American is, therefore, basically qualified to be a Commission licensee.

Accordingly, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[3] the application of American Indian Broadcast Group, Inc. for a construction permit for a new FM station on Channel 270C1 at San Angelo, Texas IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

**FOOTNOTES**

[1] The application for a construction permit for a station in Post, Texas was returned on January 28, 1988. The construction permit applications for stations in Shreveport, Louisiana and Panama City Beach, Florida were returned on March 14, 1988. American filed for reconsideration of the return of the Post, Texas application on February 19, 1988. Finally, on May 23, 1988, American filed a construction permit application for a station in Vero Beach, Florida. Thus, at no time during the pendency of its FM applications did American have more than 14 such applications active at any one time (American Ex. 2, p. 4).

[2] Subsequent to the signing of the applications, Bursack became 51% owner of American (American Ex. 1; Tr. 114).

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-136**

In the Matter of

| | |
|---|---|
| Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2 | Transmittal No. 368 |
| BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4 | Transmittal No. 271 |
| Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68 | Transmittal No. 1856 |

**ORDER**

**Adopted: October 20, 1989; Released: October 20, 1989**

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff transmittals, filed between September 14, 1989, and October 6, 1989, by various local exchange carriers (LECs), contain tariff revisions to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings. Transmittal No. 1856, filed by Southwestern Bell Telephone Company (Southwestern), proposes to offer MegaLink Custom Service to AT&T Communications (AT&T) at ICB rates. Ameritech Operating Companies (Ameritech) Transmittal No. 368 proposes to provide ICB rates for Litel Telecommunications Corporation in the State of Ohio. BellSouth Telephone Companies (BellSouth) Transmittal No. 271 describe ICB arrangements outside the scope of BellSouth's general tariffs for DS3 services. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Southwestern's Transmittal 1856; Metropolitan Fiber Systems, Inc. (MFS) filed a petition to suspend and investigate Ameritech's Transmittal 368. The captioned revisions are scheduled to become effective on dates ranging from October 21, 1989, to October 30, 1989.

2. MCI asserts that Southwestern's Transmittal 1856 is no different than tariffs currently under investigation by the Commission. MCI Petition at 2. MCI therefore requests that the Commission suspend Transmittal 1856 and include it in the ongoing investigation into ICB pricing. *Id.* MFS maintains that Ameritech has never filed a fully averaged DS3 rate structure. MFS Petition at 3. It suggests that the Commission's practice of suspending DS3 tariff filings that reflect ICB rates for only one day encourages LECs to file discriminatory service arrangements. *Id.* at 3, 8. MFS requests that Ameritech's Transmittal 368 be suspended for the full five-month period allowed by statute, or until the Commission has completed its investigation of DS3 ICB pricing in Docket No. 88-136. *Id.* at 4, 12.

3. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[1] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

4. Accordingly, IS IS ORDERED that Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 368, BellSouth Telephone Companies, Tariff F.C.C. No. 4, Transmittal No. 271, and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1856, are subject to the investigation instituted in CC Docket No. 88-136.

5. IT IS FURTHER ORDERED that the petitions to suspend and investigate filed by MCI Telecommunications Corporation and Metropolitan Fiber Systems, Inc. ARE GRANTED IN PART and otherwise ARE DENIED.

6. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 4, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-793.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

8. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**FOOTNOTE**

[1] Local Exchange Carriers' Individual Case Basis DS3 Sevice Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066

(Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**Gen. Docket No. 89-354**

In the Matter of

Amendments of Parts 2 and 15
of the Rules with regard to the
operation of spread spectrum
systems

**ORDER EXTENDING TIME TO FILE REPLY COMMENTS**

**Adopted: October 30, 1989 Released: November 1, 1989**

By the Chief Engineer:

1. A Notice of Proposed Rule Making (NPRM) in this proceeding, FCC 89-254, was adopted by the Commission on August 9, 1989 and released on August 16, 1989. Comments and reply comments to the NPRM were due on October 2, 1989 and October 17, 1989, respectively. At the request of Metricom, Inc. (Metricom) and Southern California Edison Company, the comment and reply comment periods were extended 10 days to October 12, 1989, and October 27, 1989, respectively.

2. On October 24, 1989, the American Telephone and Telegraph Company (AT&T) filed with the Commission a request for extension of time to file reply comments to November 10, 1989. AT&T stated that they were unable to obtain copies of the comments in the proceeding until close of business on October 23, 1989. They noted the large number of comments and the complexity of the technical issues as further grounds for the request. On October 26, 1989, O'Neill Communications Inc. (OCI) and Metricom both filed petitions in support of AT&T's request. OCI also cited difficulties in obtaining copies of the comments in a timely fashion. Metricom stated that damage done by the recent earthquake in the Northern California area had made it impossible for them to marshal the resources necessary at their San Jose, California, location to properly analyze and respond to the comments.

3. The Commission recognizes the complexity of the nature of the issues involved in this proceeding and values the contribution of all petitioners in the development of amended rules for spread spectrum systems. Because we desire to have a fully developed record before we begin our deliberations, the Commission has determined that an extension of the reply comment date in this proceeding is warranted. We believe, however, that a 10 day extension of the reply comment period to November 6, 1989, will provide them and all other interested parties with sufficient time to respond to all of the issues pertinent to this proceeding.

4. Accordingly, IT IS ORDERED, pursuant to the delegated authority contained in 47 CFR 0.241 (a) (5), that the period of time for the filing of reply comments in the above proceeding is extended until November 6, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
FEDEX INTERNATIONAL TRANSMISSION CORPORATION
FTC COMMUNICATIONS, INC.
MCI INTERNATIONAL, INC.
OVERSEAS TELECOMMUNICATIONS, INC.
TRT TELECOMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WU WORLD COMMUNICATIONS, INC.

File No. S-C-L-89-004

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Extending From the United States Mainland to Canada and Japan.

**CABLE LANDING LICENSE**

**Adopted: October 26, 1989; Released: November 15, 1989**

By the Commission:

1. On March 30, 1989, eight United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned joint application requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, to land and operate, at Point Arena, California, the TPC-4 high capacity digital submarine cable system extending from the United States Mainland to Canada and Japan.

2. The TPC-4 cable system will land in the United States and extend to landing points in Japan and Canada. The proposed cable system consists of four segments. Segments A, C and D are, respectively, the cable stations at Point Arena, California, Chikura, Japan and Port Alberni, British Columbia, Canada. Segment B consists of the whole submarine cable system provided between and among, and including the system interfaces at, Segments A, C and D. Segment B consists of subsegments B1 through B3. Subsegment B2 is the transpacific portion of TPC-4, from the system interface at Chikura, Japan to and including a one-third portion of the branching unit off of North America. Subsegment B3 is that portion of Segment B between the system interface at Port Alberni, British Columbia to and including a one-third portion of the branching unit. Subsegment B1 is that portion of the cable system between the system interface at Point Arena, California to and including a one-third portion of the branching unit.

3. The TPC-4 cable system will employ 1.55 micron laser technology operating at 565 Mbit/s on each of two working fiber pairs. The capacity of each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 minimum investment units (MIUs) and with each MIU consisting of a 2.048 Mbit/s bit stream containing 30 minimum assignable units of ownership (MAUOs or 64 Kilobit per second circuits). Segment B has a design capacity of 252 MIUs (7,560 MAUOs) per fiber pair for a total capacity of 504 MIUs (15,120 MAUOs).

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. Telecommunications entities in the following countries will participate as owners: Australia, Belgium, Canada, the Federal Republic of Germany, France, Hong Kong, Ireland, Italy, Japan, Korea, the Netherlands, New Zealand, the Phillipines, Singapore, Spain, Sweden, Taiwan and the United Kingdom.

5. Pursuant to our obligations under 47 U.S.C. Sections 34-39, the Department of State has been notified and has approved the landing of the TPC-4 cable system in the United States.

6. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorizations will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4335 (1976).[2] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

7. Concurrent with consideration of this application, this Commission has granted the applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the TPC-4 cable system. For the reasons set forth in that order, we find that this application requesting a cable landing license should be granted.

8. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. Section 301 at 1052 (1985), to the applicants (AT&T, Fedex, FTCC, MCII, OTI, TRT, US Sprint and Worldcom[3]) a license to land and operate one high capacity digital submarine cable having a nominal capacity of 1,130 Mbit/s (565 Mbit/s per pair SL design) with associated regenerators and supervisory circuits and armoring where necessary extending between the U.S. and Canada on the east and Japan on the west. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. Sections 151-609; (3) subsequent applicable acts; (4) all rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission

or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(4) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach of nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, or for failure to comply with the terms of the authorization;

(5) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(6) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] On April 24, 1989 WU Worldcom, Inc. assigned its interests in TPC-4 to World Communications, Inc. (Worldcom), pursuant to a Common Carrier Bureau order authorizing the assignment. *See* Western Union Corporation and World Communications, Inc., 4 FCC Rcd 2219 (Com. Car. Bur. 1989).

[2] *See* Section 214 Application, File No. I-T-C-89-086, at p. 24.

[3] *See supra* n. 1.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
FEDEX INTERNATIONAL TRANSMISSION CORPORATION
FTC COMMUNICATIONS, INC.
MCI INTERNATIONAL, INC.
OVERSEAS TELECOMMUNICATIONS, INC.
TRT TELECOMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WU WORLD COMMUNICATIONS, INC.

File No. I-T-C-89-086

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between and Among the United States, Canada and Japan.

## MEMORANDUM OPINION, ORDER AND AUTHORIZATION

**Adopted: October 26, 1989; Released: November 15, 1989**

By the Commission:

## I. INTRODUCTION

1. We are considering the above-captioned Joint Application filed on March 30, 1989, by several United States International Service Carriers (USISCs).[1] The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214 (1982), to construct and operate the TPC-4 high capacity digital optical fiber submarine cable system. The TPC-4 cable system will extend between landing points at the cable stations at Point Arena, California and Port Alberni, British Columbia, Canada, on the east, and Chikura, Japan, on the west. It will be jointly owned by thirty-one telecommunications administrations and carriers, including the Joint Applicants. The Joint Applicants propose that TPC-4 will be in service in October, 1992.

2. The Joint Applicants also request authority to (1) acquire capacity in the TPC-4 cable system; (2) acquire, by lease, such extension facilities as may be required to extend capacity in TPC-4; (3) activate and operate capacity in TPC-4 and in the aforementioned extension facilities for the provision of their respectively authorized telecommunications services; and (4) convey to their correspondents or to non-owners half-interests, on an indefeasible right of user (IRU) basis, in certain capacity currently wholly assigned to a Joint Applicant, as is necessary for the IRU recipients to provide their authorized services over the TPC-4 cable system.

3. The Commission placed the Joint Application on Public Notice on April 5, 1989. In response to public notice, STC Submarine Systems Inc. (STC) and Pacific Telecom Cable Inc. (PTC) filed comments. The Joint Applicants, and Fedex and Worldcom individually, filed reply comments.[2] PTC filed responsive comments to the reply comments.[3]

4. Based on our review of the Joint Application and associated pleadings, we grant the Joint Application.[4]

## II. DESCRIPTION OF PROPOSED FACILITIES

5. Appendix 1 shows the voting interests in the TPC-4 cable. Total U.S. voting interests are 36.88 percent. The Joint Applicants will use TPC-4 to supplement their existing facilities in the provision of service that each applicant presently is furnishing or subsequently may furnish[5] between the United States, Canada, and Japan and points beyond to both the east and west. According to the Joint Application, the TPC-4 cable system will be connected in the United States, Canada and Japan with the respective domestic networks in those countries, and will be extended by suitable facilities to the borders of other countries participating in the TPC-4 cable system or to the terminals of other international communications systems, including other cable terminals and satellite earth stations.

6. The TPC-4 Construction and Maintenance Agreement (C&MA)[6] defines the proposed cable system in terms of segments and subsegments for ownership purposes. As depicted in the schematic diagram and route sketch in Appendix 2, Segments A, C and D are, respectively, the cable stations at Point Arena, California, Chikura, Japan and Port Alberni, British Columbia, Canada. Segment B consists of the whole of the submarine cable system provided between and among, and including the system interfaces at, Segments A, C and D.[7] Segment B consists of subsegments B1 through B3. Subsegment B2 is the transpacific portion of TPC-4, from the system interface at Chikura, Japan to and including a one-third portion of the branching unit off of North America. Subsegment B3 is that portion of Segment B between the system interface at Port Alberni, British Columbia to and including a one-third portion of the branching unit. Subsegment B1 is that portion of the cable system between the system interface at Point Arena, California to and including a one-third portion of the branching unit.

7. The TPC-4 cable system will employ 1.55 micron laser technology operating at 565 Mbit/s on each of two working fiber pairs. The capacity of each fiber pair is provided in four 140 Mbit/s streams. Each 140 Mbit/s stream contains 63 minimum investment units (MIUs).[8] Each MIU consists of a 2.048 Mbit/s bit stream containing 30 minimum assignable units of ownership (MAUOs). Subsegment B2 will be 252 MIUs (7,560 MAUOs) per fiber pair for a total design capacity of 504 MIUs (15,120

MAUOs).[9] The Canada branch (Subsegment B3) will have two operating fiber pairs, with a design capacity of 504 MIUs (15,120 MAUOs). The U.S. branch (Subsegment B1) will have two operating fiber pairs and a design capacity of 504 MIUs (15,120 MAUOs). The Joint Application states that this design will allow the full restoration of traffic on either the U.S. or Canada branch in the event of a failure of one of these branches.

8. The estimated total costs of each subsegment of the TPC-4 cable system and the estimated Joint Applicants' share of capital, operating and maintenance costs associated with each subsegment of the cable are as follows:

**Table 1. TPC - 4 Cable System Estimated Costs[10]**

| Subsegment | Millions | Applicants'Share |
|---|---|---|
| B1 | $49.0 | $22.5 |
| B2 | 294.0 | 119.5 |
| B3 | 49.0 | 0.0 |
| Total Transmission Portion | $392.0 | $142.0 |
| Cable Stations[11] (Segments A, C and D) | 11.6 | 4.0 |
| TOTAL | $403.6 | $146.0 |

The estimated cost does not include interest during construction, which the Joint Applicants currently estimate to be approximately $28.6 million, or the costs of circuit multiplication equipment, which is not considered a part of the cable system and will be added as needed to serve future demand. About 85 percent of the costs of segment B of the TPC-4 cable system will be on a fixed price basis, and the remaining 15 percent of the cost will be on a cost-incurred basis. Items such as the submarine cable, the repeaters, the terminal transmission equipment and the high voltage power plant will be furnished on a fixed price basis. Items such as the cable laying, system integration route survey, plowing and burial of the cable, project management, owners' inspection and amounts payable for customs duties and value added taxes will be handled on a cost-incurred basis. The Joint Applicants will bear the capital, operating and maintenance costs of the TPC-4 cable system in accordance with Schedule C of the C&MA attached as Appendix 3 to our decision.

9. TPC-4 capacity assignments are based on the forecasted demand of each of the Joint Applicants. Schedules D-1, E-1 and E-2 of the C&MA, attached as Appendix 4, list capacity assignments to the parties. The assignments contemplate each Joint Applicant's proposed use of circuit multiplication equipment and reflect the allocation of more than 95 percent of the design capacity of subsegment B2. This 95 percent of the design capacity is known as the notional capacity. The difference between the design capacity and the notional capacity, less than five percent, is referred to as the common reserve capacity. The Joint Applicants collectively hold the common reserve capacity, in common and undivided shares, in the same proportions as their percentage interests as shown in Appendix 3. Paragraph 25 of the C&MA provides for admission of carriers other than the Joint Applicants as co-owners up to the cable system ready-for-service (RFS) date, planned to be October 1992. Both prior to and after the RFS date, carriers may acquire capacity by indefeasible right of use (IRU), lease or other mutually agreed upon arrangements.

10. The Joint Application states that, although the TPC-4 Procurement Group has not yet awarded the supply contracts for TPC-4, it is expected that AT&T will supply one-half of the cable system, consisting of all of subsegments B1 and B3 and a portion of subsegment B2, and that Kokusai Denshin Denwa Co., Ltd. (KDD) will supply the remaining portion of subsegment B2. To meet the scheduled service date of October 1992, the TPC-4 Procurement Group is scheduled to place the contracts for supply of segment B in October 1989, shortly after the scheduled signing of the TPC-4 C&MA. The Joint Application advises that, to the extent that AT&T participates in the construction of TPC-4, it is expected that other U.S. subcontractors will participate in the construction or provision of materials for the AT&T portion of the project.[12] The Joint Application asserts that AT&T's provision of a significant portion of the TPC-4 cable system will be beneficial to the U.S. economy, will enhance the role of U.S. industry as a world leader in submarine lightwave cable technology, and will continue to ensure that the U.S. submarine cable industry is a viable competitor and that the prices of future submarine cable systems remain as low as possible.

11. The portions of the TPC-4 cable to be supplied by AT&T will use AT&T's latest 1.55 micron SL560 technology and will contain two working lightguide pairs with associated regenerators and supervisory circuits. A standby transmission path, capable of being switched between repeaters, will be provided to ensure the highest possible reliability. The portions of the TPC-4 cable to be supplied by KDD will use KDD's OS560 design and will contain two working lightguide pairs, associated regenerators and supervisory circuits, as well as a switchable standby transmission path to ensure reliability. The terminal transmission equipment and high voltage power feed equipment of the SL560 and the OS560 designs use redundant equipment with automatic protection switching. The TPC-4 cable system will be buried on the continental shelves off the coast of Canada, the United States and Japan, to protect the cable from damage due to fishing and trawler activities. The cable also will be armored and fish bite protected where required.

12. The Joint Application states that TPC-4 is required to meet the telecommunications needs of the Joint Applicants and their correspondents in the Pacific Ocean Region (POR) during the period 1992-2005. It notes that TPC-4 will be the first common carrier submarine cable directly linking the U.S. and Japan and will be part of an integrated common carrier network designed to meet specific service requirements for additional digital cable facilities in the POR, to provide additional digital connectivity with the H-J-K, HAW-4/TPC-3, G-P-T, PacRimEast and PacRimWest cable systems, and to provide a direct submarine digital link between the U.S. and Canada. It also notes that TPC-4 will allow digital restoration for HAW-4/TPC-3 and will enhance service reliability by providing multiple digital transmission paths to minimize the number of circuits affected by a service interruption. The Joint Application claims that TPC-4 also will enhance service reliability because it will bring the ratio in the number of cable and satellite circuits in the POR into better balance, because its operation and maintenance will be under the direct control of the carriers using

it to carry their own traffic, and because its self-healing (self-restoration) design includes a stand-by transmission path for the entire transpacific route, the use of redundant equipment for automatic protection switching and the ability to reroute traffic over either the Canada branch (subsegment B3) or U.S. branch (subsegment B1) should either of these branches become disabled.

13. The Joint Application also claims that TPC-4 will satisfy the operational requirements of the Department of Defense (DoD) in the POR by providing additional necessary submarine cable capacity, media and path diversity, and redundancy. It further claims that TPC-4's 1.55 micron technology and direct route to Japan will provide significant economies[13] and the latest in digital technology innovations to the POR. The Joint Application asserts that TPC-4 will benefit the U.S. economy generally and the U.S. submarine cable industry specifically by promoting a leadership role for U.S. industry in lightwave submarine cable system technology, and will promote international comity. It notes that after extensive planning, development and negotiation, 31 carriers and telecommunications administrations, including those in 18 foreign locations, are participating as owners and that the configuration, design, service date and nearly fully subscribed status of TPC-4 reflect a consensus on a system best suited to their needs. Finally, seven of the eight Joint Applicants state that this Commission's new price cap system for the regulation of AT&T will provide every incentive to operate efficiently, because inefficient investment decisions, such as construction of facilities that are not required, would be undertaken solely at the expense of the carrier's shareholders.[14]

## III. PLEADINGS

14. *Comments of STC*. STC, which manufactures and supplies submarine cable systems, states that it fully supports the construction and operation of a new fiber optic submarine cable system in the Pacific Ocean Region and encourages this Commission to act promptly on the Joint Application to assure sufficient communications capability in the rapidly expanding Pacific Ocean Region. However, it finds the Joint Application to be ambiguous as to whether the subcontracts for the portion of the system AT&T anticipates it will construct will be made on the basis of fair and open competitive bidding among qualified suppliers.[15] Therefore, STC also urges this Commission to obtain assurances from the Joint Applicants that the procurement of equipment and services in connection with the construction of the cable system will be undertaken in a fair, competitive environment.

15. *Comments of PTC*. PTC, owner of the U.S. end of the private North Pacific Cable (NPC) under construction between the U.S. and Japan,[16] states that it does not oppose the implementation of a TPC-4 cable system. However, PTC expresses concern that the Joint Application is deficient in justification because it is not supported by sufficient information to satisfy the requirements of Section 214. It asserts that implementation of TPC-4 in 1992 may be unjustified. It argues that the Joint Applicants must meet an especially high standard to demonstrate that, in the context of existing Pacific Ocean region facilities capacity, the TPC-4 cable system will be in the public interest. PTC believes this high standard is required because the TPC-4 proposal has not been accorded an in-depth preliminary review in a facilities planning process. Specifically, PTC argues that the Joint Applicants have not adequately justified estimates of capacity and forecasts of demand. In particular, it asserts that the Joint Applicants must reflect the capacity already planned to be provided on NPC. It also asserts that the Joint Applicants must provide additional information concerning cost estimates, diversity and restoration requirements and technological contributions of TPC-4. PTC claims that interested parties must be given opportunity to comment on this additional information. It urges this Commission to consider carefully and thoroughly all relevant aspects of the Joint Application.

16. PTC states that it is not seeking special consideration for its own operations, asking for price concessions or guarantees of traffic or any other form of special assistance, or advocating that the Joint Applicants be subject to any extraordinary burdens. However, PTC believes that it should not be disadvantaged unfairly due to the market dominance of established carriers. It urges this Commission to recognize that established carriers have the ability and incentive to manipulate the availability of facilities and the distribution of traffic. Therefore, because it believes that market forces are not yet fully operative, it argues that this Commission must take a hard look at new facility requests by common carriers. Finally, it notes that carrier proposals to construct major international facilities always are subject to rigorous review under Section 214, citing *AT&T et al.*, 4 FCC Rcd 1129 (Com. Car. Bur. 1988) (TAT-9 214 authorization) at paragraph 17, and claims that the level of review must be increased in the absence of a prior planning process.

17. *Reply Comments of the Joint Applicants*. In reply, AT&T, MCI and OTI contend that the Joint Applicants have satisfied the requirements of Section 214, the Cable Landing License Act and relevant Commission rules.[17] Responding to PTC's claim that the Joint Application is deficient because it does not address the availability of NPC, they state that this Commission has ruled on several occasions that common carriers are not obligated to use private cables, and that such cables must succeed or fail on their own merits, not through Commission action to guarantee common carrier use. Moreover, they note that they do not seek to use capacity in NPC and thus that Section 214 does not require them to include a discussion of NPC in their applications.

18. In response to PTC's contention that the TPC-4 Joint Applicants must meet an especially high standard, in the absence of a facilities planning process for TPC-4, AT&T, MCI and OTI state that this Commission's review of the Joint Application for TPC-4 must be conducted in accordance with the public interest standard in Section 214, as opposed to a more onerous standard, and that under this standard and the appropriate Commission rules, the Joint Application is in no way deficient. They note that there is no requirement that this Commission conduct a facilities planning proceeding and that Section 214 and applicable Commission rules place no greater requirements on this Commission or the Joint Applicants in the absence of a planning docket.[18] They allege that the Joint Applicants have documented demand for TPC-4 capacity, provided thorough cost support, and shown public interest benefits by means of support of U.S. industry, national security and international capacity.

19. AT&T, MCI and OTI also oppose STC's request that this Commission require assurances that any subcontracts that AT&T may issue for the portion of the cable system

that AT&T may build be issued on the basis of "open competitive bidding." They state that there is no need or basis for the Commission to impose such a requirement. Noting that the market for cable system components is highly competitive, they state that any subcontracts will be awarded to those firms in the market best able to meet the requirements of the TPC-4 cable system in a cost-effective manner. They also state that the presence of competing carriers on both the U.S. and foreign ends of the cable system and of rival cable systems creates the strongest possible incentives for efficient procurement practices. They further note that this Commission's price cap system for regulating AT&T underscores AT&T's incentive to subcontract with only the most cost-effective suppliers. AT&T, MCI and OTI urge this Commission to deny the requests of PTC and STC and to proceed without delay to authorize the construction, acquisition and operation of the TPC-4 cable system.

20. *Response of PTC*. PTC responds that the Joint Applicants cannot maintain that the future availability of NPC is irrelevant to the need for TPC-4. PTC states that the Commission relied on the presence of private cables in its *Circuit Distribution Order*[19] as a factor in creating incentives for carriers to operate efficiently. PTC also asserts that the Joint Applicants incorrectly deny the need for comprehensive review of TPC-4. It cites *Pacific Facilities Planning*,[20] where this Commission stated its belief that comprehensive review of long range regional needs and facilities options, rather than an ad hoc review of individual facilities applications, was necessary to serve the public interest objective of attaining efficient use of the lowest cost combination of facilities to meet traffic needs and service quality requirements. PTC states that it is not asking this Commission to open a planning docket but to give close scrutiny to the Joint Application because TPC-4 previously has not been evaluated in a planning process and because PTC believes that TPC-4 is contrary to AT&T's prior representation that TPC-3 would meet POR demand through 1995. PTC also asserts that the Joint Application is inadequate because the statements that HAW-4/TPC-3 is fully subscribed are meaningless and do not reflect a need for TPC-4 in 1992, because the Joint Applicants have filed their demand data under claim of confidentiality,[21] and because the Joint Application provides no other justification for implementation of TPC-4 in 1992. Finally, PTC claims that the Joint Applicants seek to manipulate the regulatory process by flooding the Pacific market with carrier cable capacity prematurely, thereby deleteriously impacting a competitive facility such as NPC. Thus, PTC urges this Commission to defer action on the TPC-4 application.

## IV. DISCUSSION

21. The Joint Applicants seek authority to construct and operate the digital TPC-4 cable system to begin service in 1992 and meet their telecommunications capacity needs and those of their correspondents in the POR during the period 1992-2005. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended.[22] We conclude that implementation of the TPC-4 cable system in 1992 will serve the public interest, and certify that the public convenience and necessity require the construction and operation of TPC-4 as described herein. We grant the Joint Application subject to certain conditions.

### A. *No Need for A Planning Proceeding*

22. At the outset, we determine that there is no need to conduct a facilities planning process prior to considering the application before us. Moreover, we agree with the Joint Applicants that Section 214 and applicable Commission rules place no greater requirements on this Commission or the Joint Applicants in the absence of a planning proceeding.

23. There is no requirement in the Communications Act that this Commission must undertake a facilities planning process before it considers a Section 214 application to construct and operate a submarine cable system. To the contrary, Section 214 of the Act provides ample authority for Commission consideration of those factors that bear on a public interest, convenience and necessity determination. We recognize that since 1970 this Commission has chosen to exercise its Section 214 approval authority over international common carrier facilities through a two-step facilities planning and licensing procedure. Each of the planning documents has developed policy guidelines for the licensing of facilities during the applicable time period, and for the specific geographic region, covered by the planning process. We first adopted this two-step procedure in 1970 for the North Atlantic Region[23] to develop comprehensive plans that would result in the lowest cost combination of facilities, both cable and satellite, and to ensure that U.S. ratepayers were not burdened unnecessarily with excessive facility investments or inefficient use of authorized facilities. We continued this procedure in 1982 and 1985 for the Pacific Ocean Region,[24] in 1988 for the Caribbean Region[25] and again in 1979, 1981, and 1988 for the North Atlantic Region.[26]

24. We believe that we can now move away from comprehensive facilities planning proceedings in view of several recent developments.[27] First, our recent adoption of price cap regulation of AT&T significantly protects AT&T ratepayers from the results of potentially imprudent facilities investment.[28] Thus, our concern about the burden placed on ratepayers, as opposed to stockholders, by unnecessary investment in submarine cable facilities has been greatly diminished. These concerns are similarly alleviated with respect to non-dominant carriers because they, by definition, have no market power and also act at investor, as opposed to ratepayer, risk in making long-term financial investments in cable facilities.[29] Additionally, our elimination of circuit distribution guidelines in favor of agreements between Comsat and AT&T and other carriers on the distribution of traffic between satellite and cable facilities and our authorization of competing private cable and separate satellite systems provide incentives for efficient investments in both cable and satellite facilities.[30] In view of the increasingly competitive environment in the provision of international transmission facilities and services and the changing regulatory approaches that we already have undertaken, including reliance on competition and a price cap system to provide incentives for carrier investment decisions, we find it is not necessary to engage in a facilities planning proceeding before acting on the Section 214 application for construction and operation of the common carrier submarine cable facilities

pending before us. We of course reserve the option to utilize such procedures in the future should circumstances change or otherwise so require.

### B. *Section 214 Review*

25. We are required to make a determination under Section 214 of the Communications Act that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application. The standard we employ is "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[31] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[32] We will consider these factors here as well as those issues raised in comments filed in response to the Joint Application. We disagree with PTC that we must employ any higher standard in the absence of a facilities planning proceeding.[33] The same statutory standard applies regardless of the procedure that we use to make our determination.

#### 1. *Demand, Capacity and Demand Flexibility*

26. Under the traditional form of demand analysis that we have applied in authorizing the construction and operation of submarine cable systems, we conclude that projected traffic demand, along with other factors, supports the construction of TPC-4 in 1992.[34] The circuit activation data submitted by the Joint Applicants forecast the number of 64 Kbit/s circuits they plan to activate on HAW-4/TPC-3 and TPC-4 during the period of October 1992 through 1996. The aggregate number of forecasted circuits for the years 1992-96 are, respectively, 4346, 5828, 6611, 7419, and 8018. These data represent the Joint Applicants' projected demand for common carrier 64 Kbit/s bearer circuits in POR cable facilities for the relevant time period. As for capacity, the Joint Applicants currently have 7103 64 Kbit/s half-circuits on the Hawaii-Japan and Hawaii-Guam links of TPC-3. *See* Supplemental Application of American Telephone and Telegraph Co., I-T-C-89-039, Schedule D (filed December 30, 1988). Of these, 6341 half-circuits are assigned to those POR countries that will be served by TPC-4. Comparing the existing capacity of 6341 half-circuits in TPC-3 with the Joint Applicants' forecasted requirements for cable circuits, we conclude that TPC-3 will be 92 percent utilized by the end of calendar year 1993, only 15 months after the planned ready-for-service date of TPC-4. Moreover, we traditionally have recognized a need to ensure sufficient demand flexibility and to avoid service disruptions caused by saturated facilities. We have focused on a 20 percent demand flexibility (*i.e.*, the ability to accommodate a circuit demand 20 percent larger than that forecast) as a reasonable measure of adequate demand flexibility. *See, e.g., North Atlantic Facilities Planning*, 3 FCC Rcd at 3984. Our analysis of the circuit activation data provided by the Joint Applicants and the capacity currently available to the Joint Applicants in TPC-3 leads us to conclude that the TPC-3 facility will not accommodate a 20 percent demand flexibility throughout 1993. If the growth in circuit demand during 1993 is assumed to be evenly distributed throughout the calendar year, adequate demand flexibility will be accommodated only through July 1993. We conclude that the nine month difference between a ready-for-service date of October 1992 and the July 1993 threshold is not significant, especially where, as here, the new facility also will increase media and route diversity, provide digital restoration capabilities for HAW-4/TPC-3, enhance intermodal and intramodal competition, and promote international comity.[35]

27. Additionally, in the case of both AT&T and the other Joint Applicants, we conclude that current competitive conditions and regulatory approaches provide them the incentive to make rational economic decisions and not engage in unnecessary construction of facilities. As a result, we believe that we are able to give them wider latitude in determining what facilities to construct and when to place such facilities in service than we have in considering previous applications for submarine cable facilities.

28. The price cap system of regulation that we recently adopted to replace rate of return regulation of AT&T focuses regulation on the prices charged by AT&T rather than on the rate of return that it earns on its investment. As a result, price cap regulation limits the incentives that AT&T may have to engage in unnecessary investment in order to increase its revenue requirement.[36] Under price cap regulation, in order generally to avoid having rate filings suspended, AT&T must reduce its costs through efficiency and innovation or its profits may be less than they would have been under rate of return regulation. Therefore, AT&T must assess carefully the need for and cost of any major new facility. Should it construct a facility prematurely, its shareholders likely would bear the additional cost of carrying the facility until it would be needed. In a price cap environment, as detailed analyses of traffic demand, facility capacity and facility costs as were previously undertaken by this Commission to prevent unnecessary investment are no longer necessary for review of AT&T's participation in the construction of submarine cable facilities.

29. In addition, the presence of an increasingly competitive market in the provision of international facilities and services helps to ensure that carriers will invest prudently in international facilities.[37] The non-dominant carriers by definition have no market power. Any non-dominant carrier that raises rates above those set by the marketplace to recover imprudent investments risks the loss of potential customers.[38]

30. Finally, to the extent that PTC argues that there is insufficient demand for TPC-4 because it believes that the capacity of NPC must be taken into account before a second carrier-owned digital fiber optic cable to Japan can be authorized, we have considered and rejected a similar contention in our decisions authorizing the TAT-9 cable in the North Atlantic Region.[39] There we specifically declined to consider private cable facilities as a substitute for common carrier facilities and delay the introduction of TAT-9 in view of the planned private cable facility in the North Atlantic Region. We have made it clear on several occasions that private cable systems are risk ventures and that we would not guarantee such systems common carrier traffic.[40] Additionally, in conditionally granting PTC a cable landing license to land and operate NPC, the Common Carrier Bureau noted our policy that private cable systems shall succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of any such system.[41] We see no basis for taking a different approach here.

### 2. *Cost Analysis*

31. The Joint Application estimates the costs of TPC-4 to be $403.6 million, with the Joint Applicants' share to be $146.0 million. In addition, it estimates that interest during construction will approximate $28.6 million. Eighty-five percent of the costs of Segment B will be on a fixed cost basis. Schedule C to the Joint Application provides that the Joint Applicants will bear approximately 46 percent of the capital, operating and maintenance costs of subsegment B1 and Segment A, approximately 41 percent of the costs of subsegment B2 and Segment C, and none of the costs of subsegment B3 and Segment D. The Joint Application also states that the original capital cost of a 64 Kbit/s half-circuit (half-MAUO) in TPC-4 will be $12,200, which will decrease to $11,400 when notional capacity reaches design capacity and the Joint Applicants no longer must carry jointly the costs of the unsubscribed capacity held in common reserve. In their reply comments, AT&T, MCI and OTI advise that TPC-4 is now fully subscribed, bringing the cost of a 64 Kbit/s half-circuit to $11,400.

32. PTC claims that the Joint Applicants have submitted insufficient cost data to support their application to construct TPC-4. It asserts that the cost estimates provided in the Joint Application are probably low. It notes that carriers participating in the ownership of common carrier cables must pay their allocable share of actual costs, whereas PTC will sell capacity in its private cable at a firm price. Moreover, PTC argues that the reasonableness of the TPC-4 cost estimates depends on the reliability of the concept of notional capacity.[42] PTC believes that, because AT&T has approximately 30 percent of the notional capacity in subsegment B1, it could control the price of a circuit in this subsegment. Finally, PTC states that the Joint Applicants have reduced the quoted price for a TPC-4 circuit several times over the past year, and that in each instance the price reduction, not necessarily coincidentally, matched prices announced for capacity in NPC. PTC is concerned that the price reductions may not represent true marketplace efficiencies but rather manipulation of the notional capacity figures.

33. We find the cost data provided by the Joint Applicants sufficient to support their application to construct TPC-4. The Joint Application provides the total cost of TPC-4, the Joint Applicants' share, the subsegment costs, the Joint Applicants' share of the subsegment costs, the percentages of fixed and cost-incurred costs, and the cost of a 64 Kbit/s half-circuit. We do not agree with PTC that the unit cost for a 64 Kbit/s half-channel is somehow suspect. To the extent that PTC is concerned that the half-circuit price is less reasonable because it believes that the concept of notional capacity is not reliable, the Joint Applicants have advised that subscribership in TPC-4 now has reached design capacity. Thus, the concept of notional capacity as a determinant of unit cost is not relevant. Moreover, the unit cost for a half-circuit is readily discernible. The estimated subsegment B1 cost ($49M) divided by 12,750 MAUOs (425 MIUs from Appendix 3 multiplied by 30 to give the number of circuits) is $3,843. Thus, the estimated 64 Kbit/s half-circuit cost for subsegment B1 is $1,922. The estimated subsegment B2 cost ($294M) divided by 14,430 MAUOs (481 MIUs x 30) is $20,374. Thus, the estimated 64 Kbit/s half-circuit cost for subsegment B2 is $10,187. The estimated 64 Kbit/s half-circuit cost for Segment B is the sum of $1,922 and $10,187, or $12,109.[43] This total excludes the half-circuit share of cable station costs, which are nominal in relation to the half-circuit transmission costs. Additionally, because of technological innovation and TPC-4's direct route to Japan, the 64 Kbit/s half-circuit price of $12,109 or $11,545 is less than one-third of the cost for a 64 Kbit/s half-circuit in HAW-4/TPC-3, which was $40,000. As to PTC's stated concern that the co-owners of TPC-4 must pay their allocable share of actual costs, whereas carriers could purchase capacity in NPC at a firm price, to the extent this argument is even relevant to our inquiry, the Joint Application provides that 85 percent of the costs of Segment B will be on a fixed price basis. Moreover, because of price cap regulation for AT&T, the non-dominant status of the other Joint Applicants and the availability of NPC and other facility alternatives, the TPC-4 co-owners have every incentive to reduce costs to remain competitive in their provision of international common carrier services.

### 3. *Quality of Service*

34. *Media and Route Diversity.* We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.[44] Media diversity is provided by the use of more than one transmission medium, satellite or cable, to carry a correspondent's traffic. Media diversity protects against the systemic failure of one medium. Route, or path, diversity concerns the number of independent routes that carry traffic to a given correspondent. It is closely related to the ability to restore circuits in case of a facility failure. The more facilities serving a given location, the better the ability to restore one that fails. An increase in path diversity frequently is the natural consequence of the introduction of another facility into a region.

35. We conclude that TPC-4's separate route will enhance service reliability by minimizing the number of circuits affected by a service interruption. TPC-4 is designed to operate as a part of an integrated common carrier digital facilities network in the POR. It will provide digital interconnectivity with the H-J-K (Hong Kong-Japan-Korea), G-P-T (Guam-Philippines-Taiwan), HAW-4/TPC-3 and PacRimEast (Hawaii-New Zealand) and PacRimWest (Guam-Australia) cable systems. It also will provide a direct digital submarine link between the United States and Japan and Canada. PTC contends that the ability of TPC-4 to offer meaningful route diversity is reduced substantially because TPC-4 and HAW-4/TPC-3 both land at Point Arena, California and Chikura, Japan. However, we conclude that this aspect of the TPC-4 system design provides additional service reliability. The common landing points at the Point Arena and Chikura cable stations will provide additional flexibility in routing digital traffic around a service interruption in one of the links involved in the POR digital network. Moreover, the landing point at Port Alberni, Canada will provide additional route diversity in the event that the link between the branching unit of TPC-4 and the cable landing station at Point Arena should suffer a service interruption.

36. PTC also asserts that, although implementation of TPC-4 would increase the number of routes available for transmission of transpacific traffic, we must scrutinize closely the factual support for authorizing both HAW-4/TPC-3 and TPC-4 during the proposed timeframe when technically comparable capacity on NPC also is available.

Further, PTC contends that, although service reliability will be marginally enhanced by adding an alternate transmission path, such redundancy, in the absence of significant usage, must be weighed against the cost to the public of constructing a major facility. We reject both of PTC's contentions. First, as we have discussed above, it has never been our policy to consider a private cable as a substitute for a common carrier cable or otherwise guarantee common carrier traffic to a private cable facility. Second, we have found that TPC-4 is justified on a demand basis and we expect significant usage of the cable. Further, price cap regulation serves as a further protection for AT&T ratepayers from the results of premature construction of facilities.

37. We further conclude that TPC-4 also will enhance media diversity. The Joint Application advises that currently 80 percent of AT&T's international message telecommunications service (IMTS) traffic in the POR is routed via satellite circuits, and that the other Joint Applicants experience a similar satellite-cable mix because of a shortage of cable facilities in the POR. Just prior to the ready-for-service date of TPC-4, the Joint Applicants project that AT&T's cable/satellite ratio for IMTS traffic will be 34/66. They state that the introduction of TPC-4 will bring this ratio into better balance. PTC is concerned that the justification provided by the Joint Applicants may be inconsistent with the data that AT&T submitted in this Commission's *Circuit Distribution* proceeding.[45] It suggests that the 34/66 ratio does not represent an imbalance in cable/satellite traffic because it believes that AT&T has agreed to maintain a ratio in that range. However, the cable/satellite ratios set forth in the Comsat/AT&T agreement that served as a basis for the *Circuit Distribution* decision stipulate the percent of AT&T's global IMTS growth traffic that it will place, as a minimum, on INTELSAT through 1994. Our *Circuit Distribution* decision explicitly recognized that AT&T can activate additional satellite circuits to meet its needs during the period and has the flexibility to redistribute its circuits among different geographic regions.[46] We concluded that these provisions, among others, had the effect of maintaining a level of use of INTELSAT facilities by AT&T that we believed would be sufficient to ensure the continued fulfillment of the fundamental objective of the Communications Satellite Act of 1962 -- the establishment and operation of a global commercial communications satellite system -- while giving AT&T flexibility in making circuit distribution decisions in the face of growing competition.[47] We noted that AT&T would continue to account for a significant portion of INTELSAT's revenue requirement under the agreement. Although the percentage of AT&T's IMTS voice paths routed via INTELSAT facilities was projected to decrease from approximately 61 percent at year-end 1987 to approximately 46 percent in 1994, the absolute number of AT&T's IMTS voice paths placed on INTELSAT was projected to increase each year during the base period of 1988 to 1994.[48] It would appear, then, that, notwithstanding that the Comsat/AT&T agreement did not stipulate regional percentages, the Joint Applicants' intention to decrease their IMTS use of POR satellite circuits from 66 percent after introduction of TPC-4 in 1992 is consistent with the downward trend in satellite percentages that AT&T projected for its global IMTS requirements. For the foregoing reasons, we do not agree with PTC that the introduction of TPC-4 would throw the Comsat/AT&T ratio "completely out of whack in favor of cable facilities." Moreover, in our *Circuit Distribution* decision we expressly required AT&T to file with this Commission the semi-annual reports it provides to Comsat on its facilities loading, with the understanding that these reports are to be made publicly available. We determined that we would monitor AT&T's facilities loading decisions to ensure continued fulfillment of the objective of the Communications Satellite Act. Thus, to the extent that PTC is concerned about tracking AT&T's cable/satellite ratios, PTC or any other party currently has access to such data. Therefore, we find no merit in PTC's contention that AT&T must clarify further, within the context of this Joint Application, its facilities loading projections for the POR.

38. *Restoration.* The Joint Application states that many customers, especially those requiring data communications, are becoming increasingly sophisticated and are insisting on digital cable backup for their private networks and other custom services. PTC contends that the Joint Applicants' claims concerning the restoration capabilities of TPC-4 do not justify the new cable. It states that HAW-4/TPC-3 was justified in part because of its claimed high reliability and because this Commission found that the "self-restoring" ring design would offer additional restoration advantages. It also notes that no commenter in the Pacific planning proceeding[49] anticipated the need for a TPC-4 cable system primarily for restoration purposes, and that, given the claimed high reliability of HAW-4/TPC-3, this Commission stated that it did not then anticipate a need for a ratepayer-supported TPC-4 substantially for restoration purposes. PTC believes that restoration services over both satellite and cable for HAW-4/TPC-3 are adequately provided without TPC-4 until both TPC-3 and NPC are filled with actual traffic.

39. We find that TPC-4 will provide a viable restoration alternative for HAW-4/TPC-3. It will provide restoration capabilities that currently are unavailable by allowing for digital cable restoration via a second common carrier digital cable. Restoration of HAW-4/TPC-3 currently is occurring through the use of INTELSAT capacity. We previously have stated that satellite capacity provides a satisfactory restoration alternative for cable. However, we also have recognized that absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements that may best be accommodated by fiber optic cable facilities.[50] Moreover, as we have stated on numerous occasions, we will not require common carriers to place their traffic on a private cable, such as NPC. Thus, we cannot agree with PTC's assertion that the restoration capabilities of TPC-4 should not be given decisional weight in view of the availability of NPC to provide restoration services. U.S. carriers may obtain capacity in NPC for restoration or other purposes or they may choose to use TPC-4. We will not, however, effectively require the use of NPC by denying or delaying TPC-4.

#### 4. *Technological Innovations*

40. TPC-4 will introduce AT&T's latest 1.55 micron laser wavelength and 565 Mbit/s technology to the POR. The 1.55 micron technology reduces the number of repeaters that would have been required with a 1.3 micron laser wavelength. Although we agree with PTC that this technology may not be an innovation of such magnitude as was the initial introduction of digital, fiber optic submarine cable technology into the POR,[51] we nonetheless

find that this new technology provides public interest benefits. The reduced number of repeaters results in cost savings to the TPC-4 cable system.

### 5. *Competitive Considerations*

41. *Intermodal and Intramodal Competition.* We previously have recognized that enhancing both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[52] We find that introduction of TPC-4 will enhance intramodal competition in the POR and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that introduction of TPC-4 will increase intermodal competition with INTELSAT and separate satellite system providers and thereby spur existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance, the economy and efficiency of their operations. The opportunity to choose among facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

42. PTC contends that the Joint Application raises substantial questions, not only as to whether the proposed facility would contribute to the Commission's pro-competitive objectives, but whether grant of the application would impede competition. In addition to its arguments that we should consider the availability of NPC in assessing the public interest factors of demand, capacity, restoration and route diversity, which we have discussed and rejected above, PTC states that "premature flooding of the Pacific market with carrier cable capacity will not necessarily work a significant financial hardship on entrenched and established carriers, but will have a deleterious impact on a competitive facility such as NPC." PTC alleges that TPC-4 is a facility controlled by a dominant carrier that, absent effective oversight by this Commission, could manipulate facilities capacity and demand to ensure continuation of its dominance. PTC continues, "what is really at stake in this proceeding is the Commission's ability to maintain effective international regulatory oversight over AT&T."

43. We do not agree with PTC that authorization of TPC-4 in 1992 will impede facilities competition in the POR. Recent experience in the North Atlantic Region demonstrates significant common carrier interest in the use of private cable facilities. Subsequent to authorization of TAT-9, numerous common carriers, some with interests in TAT-9, have filed applications to acquire capacity in PTAT, the private cable facility in the North Atlantic Region.[53] Thus, we are now seeing enhanced intramodel competition in the North Atlantic Region. We also do not agree with PTC that these applicants seek to manipulate the regulatory process by proposing what PTC considers to be unnecessary facilities. As noted, this Section 214 review process provides ample opportunity for our consideration of all factors relevant to our authorizing the construction of these new international facilities. Based on our review of these issues, and for the reasons set forth herein, we conclude that these facilities are justified under the public convenience and necessity standard of Section 214.

44. *Competitive Procurement.* STC, although expressly supporting the construction of TPC-4, requests this Commission to seek assurances from the Joint Applicants that the subcontracts for the portion of TPC-4 that AT&T expects to construct will be awarded on the basis of competitive bidding among qualified suppliers. As a manufacturer and supplier of submarine cable systems, STC is concerned about the language in the Joint Application that states that the U.S.-constructed portion of TPC-4 "will use AT&T's latest 1.55 micron SL560 technology." STC believes that this statement can be interpreted to mean that AT&T plans to acquire the cable on a sole source, non-competitive basis. STC argues that non-competitive acquisition of the cable would deprive the public and the other carriers participating in TPC-4 of the benefits of competitive procurement and could result in a higher cost for international services.

45. We believe that the Joint Application demonstrates that qualified suppliers will be afforded a reasonable opportunity to participate in the procurement of TPC-4. As the Joint Application notes, the U.S.- supplied portions of HAW-4/TPC-3 used more than 65 subcontractors from 22 states. The presence of NPC also will serve as a strong incentive for efficient procurement of TPC-4. Moreover, under price cap regulation, AT&T has the incentive to subcontract with those suppliers that offer a competitive price. The Joint Applicants anticipate that a multitude of subcontractors will participate in the construction or provision of materials for any portion of TPC-4 that is supplied by AT&T.[54] Given the existing incentives to subcontract in a cost-effective manner, we can find no public interest benefit to involving this Commission in the management of the TPC-4 procurement decisions. Therefore, we do not believe that it is necessary to condition the grant of TPC-4 on further assurances of competitive procurement practices.

### 6. *International Comity*

46. Our decisions authorizing the construction and operation of transoceanic submarine cable systems historically have recognized that correspondent acceptance is an important public interest factor.[55] PTC agrees that international comity is important, but asserts that we should not authorize TPC-4 merely because the Joint Applicants and their foreign correspondents have reached a consensus on the cable's design and implementation schedule. Our decisions, of course, are not decided solely by the needs and desires of our foreign correspondents. As we have concluded earlier in this order, there are several other factors that support introduction of TPC-4 in 1992. Foreign correspondent acceptance is but one of those factors, and we find that TPC-4 will promote international comity. Thirty-one telecommunications entities and carriers, including those from 18 foreign countries, have agreed that the TPC-4 system design and 1992 service date will meet the service needs of their customers. Correspondent acceptance is also evidenced by the cable's fully subscribed status.

## V. CONCLUSION AND ORDERING CLAUSES

47. The instant application to construct and operate the TPC-4 optical fiber cable system will serve the public convenience and necessity. The proposed system is required to satisfy the service preferences and needs of

users. Because of technological innovation and TPC-4's direct route to Japan, the half-circuit price for capacity in TPC-4 is less than one-third of the cost for comparable capacity in HAW-4/TPC-3. The TPC-4 cable system will provide service quality benefits in terms of increased route and media diversity and restoration capability, and will enhance intermodal and intramodal competition. The proposed system also meets international comity concerns.

48. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorizations will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4335 (1976).[56] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

49. Upon consideration of the Joint Application, we find that the present and future public interest, convenience and necessity requires the construction and operation of the TPC-4 cable system as described herein.

50. Accordingly, IT IS ORDERED that the Joint Application, File No. I-T-C-89-086, of the USISCs (AT&T, Fedex, FTCC, MCII, OTI, TRT, US Sprint and Worldcom[57]) is GRANTED, subject to the following terms, conditions and limitations, and the Joint Applicants are authorized to:

(a) construct and operate the TPC-4 Cable System as proposed herein;

(b) acquire and activate capacity in the TPC-4 Cable System, on an ownership basis, in the interests indicated in the MIUs specified in Appendix 4;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the TPC-4 Cable System;

(d) utilize digital circuit multiplication systems (DCMS) equipment to derive additional voice paths from the circuits (MIUs) authorized herein in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the TPC-4 Cable System and aforementioned extension facilities for the provision of the Joint Applicants' authorized telecommunications services.

51. IT IS FURTHER ORDERED that AT&T and MCII shall convey the whole-circuit interests that they hold in the TPC-4 Cable System, on an ownership or IRU basis, for joint use by the Applicants and their correspondents on or before the TPC-4 RFS date.

52. IT IS FURTHER ORDERED that when a given Joint Applicant seeks to acquire or transfer an ownership or IRU interest in the TPC-4 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

53. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the TPC-4 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

54. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between the U.S. and Pacific Ocean Region.

55. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing, and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

56. IT IS FURTHER ORDERED that no Joint Applicant that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107, shall dispose of any interest in any TPC-4 capacity it is authorized to acquire in any way without prior authorization by the Commission.

57. IT IS FURTHER ORDERED that the Joint Applicants shall include TPC-4 facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

58. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to the Joint Applicants herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. Sections 34-39), covering the subject submarine cable, and shall become effective upon the acceptance of the aforementioned license by all such parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix 1

SCHEDULE B

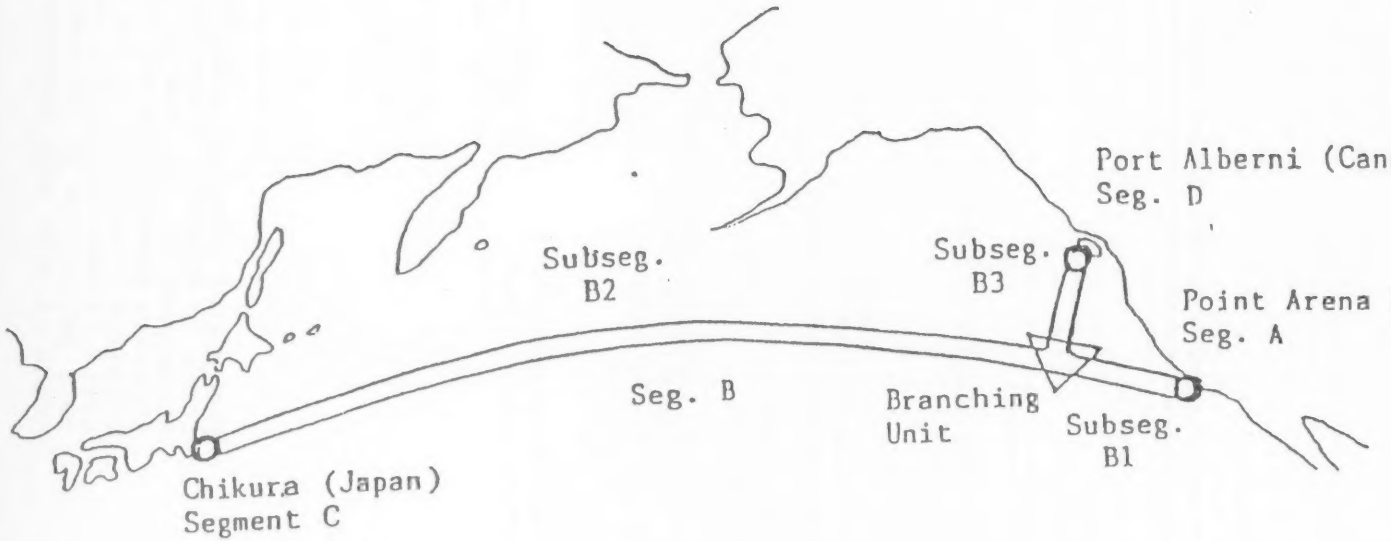
VOTING INTERESTS IN THE TPC-4 CABLE SYSTEM:

| PARTIES | PERCENT |
|---|---|
| OTC (Australia) | 7.75166 |
| RTT (Belgium) | 0.09432 |
| TELEGLOBE (Canada) | 10.94183 |
| FT (France) | 0.62959 |
| DBP (Federal Republic of Germany) | 1.22610 |
| CWHK (Hong Kong) | 0.09432 |
| BTE (Ireland) | 0.09432 |
| ITALCABLE (Italy) | 0.44095 |
| IDC (Int'l. Digital, Japan) | 0.44095 |
| ITJ (Int'l. Telecom, Japan) | 4.37157 |
| KDD (Kokusai Denshin Denna, Japan) | 23.87156 |
| KTA (Korea) | 1.85568 |
| NPTT (Netherlands) | 0.53527 |
| TCNZ (New Zealand) | 0.36625 |
| STA (Sweden) | 0.18863 |
| CAPWIRE (Capital Wireless, Philippines) | 0.09432 |
| PHILCOM (Philippine Global Com.) | 0.63203 |
| PLDT (Philippine Long Distance) | 1.88875 |
| TELECOMS (Singapore) | 0.53527 |
| TELEFONICA (Spain) | 0.25232 |
| ITDC (Taiwan) | 1.95245 |
| BT PLC (British Telecom, U.K.) | 4.77029 |
| MCL (Mercury, U.K.) | 0.09432 |
| AT&T | 24.80489 |
| FITC | 0.09432 |
| FTCC | 0.28295 |
| MCII | 8.48837 |
| OTI | 0.09432 |
| TRT | 0.37726 |
| US SPRINT | 1.69767 |
| WUW | 1.03747 |
| | 100.00000 |

Note: The voting interest percentages set forth in Schedule B are derived from the Subsegment B1, B2, and B3 ownership interest percentages set forth in Schedule C weighted by the estimated costs of each Subsegment and expressed as a percentage of the estimated total costs of each such Subsegments.

ATTACHMENT C

TPC-4 System



Appendix 3
1 of 2

SCHEDULE C

OWNERSHIP INTERESTS AND ALLOCATION OF CAPITAL, OPERATING AND MAINTENANCE COSTS OF SUBSEGMENT B1, B2, AND B3; AND ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS OF SEGMENTS A, C, AND D OF THE TPC-4 CABLE SYSTEM

| PARTIES | SEGMENT A SUBSEGMENT B1 | SEGMENT C SUBSEGMENT B2 | SEGMENT D SUBSEGMENT B3 |
|---|---|---|---|
| OTC | 6.35294 | 6.86071 | 15.71429 |
| RTT | 0.11765 | 0.10395 | 0.00000 |
| TELEGLOBE | 0.47059 | 6.96466 | 50.71426 |
| FT | 0.58824 | 0.62370 | 0.71429 |
| DSP | 1.52941 | 1.35135 | 0.00000 |
| CWHK | 0.11765 | 0.10395 | 0.00000 |
| BTE | 0.11765 | 0.10395 | 0.00000 |
| ITALCABLE | 0.35294 | 0.41580 | 0.71429 |
| IDC | 0.35294 | 0.41580 | 0.71429 |
| ITJ | 5.05882 | 4.67775 | 1.42857 |
| KDD | 27.41176 | 25.46778 | 8.57143 |
| KTA | 2.11765 | 1.97505 | 0.71429 |
| NPTT | 0.47059 | 0.51975 | 0.71429 |
| TCNZ | 0.47059 | 0.20790 | 1.42857 |
| STA | 0.23529 | 0.20790 | 0.00000 |
| CAPWIRE | 0.11765 | 0.10395 | 0.00000 |
| PHILCOM | 0.00000 | 0.41580 | 2.85714 |
| PLDT | 1.76471 | 1.87110 | 2.14286 |
| TELECOMS | 0.47059 | 0.51975 | 0.71429 |
| TELEFONICA | 0.11765 | 0.20790 | 0.71429 |
| ITDC | 1.64706 | 1.87110 | 2.85714 |
| BT PLC | 4.00000 | 4.26195 | 9.28571 |
| MCL | 0.11765 | 0.10395 | 0.00000 |
| AT&T | 30.94114 | 27.33889 | 0.00000 |
| FITC | 0.11765 | 0.10395 | 0.00000 |
| FTCC | 0.35294 | 0.31185 | 0.00000 |
| MCII | 10.58824 | 9.35551 | 0.00000 |
| OTI | 0.11765 | 0.10395 | 0.00000 |
| TRT | 0.47059 | 0.41580 | 0.00000 |
| US SPRINT | 2.11765 | 1.87110 | 0.00000 |
| WUW | 1.29412 | 1.14345 | 0.00000 |
| TOTAL | 100.00000 | 100.00000 | 100.00000 |

SCHEDULE C, Notes

Notes 1. The percentages set forth in Schedule C are calculated from MIU Assignments shown in Schedule E1, E2 and E3.

2. For purposes of this Agreement, Transpacific (TPCI) shall be assigned all of the AT&T interests in the TPC-4 Cable System within Japan or Canada including their territorial waters and shall be responsible for the Capital, Operating and Maintenance costs for the percentages listed against AT&T for Segments C and D and the portions of Segment B within Japan or Canada including their territorial waters. AT&T shall be responsible for the Capital, Operating and Maintenance costs for the percentage listed against AT&T for the remainder of Segment B.

SCHEDULE D-1

ASSIGNMENT OF MIUS BETWEEN UNITED STATES AND JAPAN
SYSTEM INTERFACES

JOINTLY ASSIGNED MIU CAPACITY

| PARTIES | OTC | CUHK | IDC | ITJ | KDD | KTA | TCHZ | CAPWIRE | PLDT | TELECOMS | ITDC | MCII-G | SUBTOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| OTC | 0 | 0 | 0 | 0 | 7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 7 |
| RTT | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| FT | 2 | 0 | 0 | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 5 |
| DBP | 2 | 0 | 0 | 1 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 9 |
| BTE | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| ITALCABLE | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 3 |
| MPTT | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 |
| TCHZ | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| STA | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| TELEFONICA | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| BT PLC | 0 | 0 | 1 | 1 | 21 | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 25 |
| MCL | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| AT&T | 16 | 0 | 0 | 22 | 111 | 15 | 1 | 0 | 12 | 3 | 9 | 2 | 191 |
| FITC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 |
| FTCC | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 |
| MCII | 9 | 1 | 1 | 11 | 34 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 58 |
| OTI | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| TRT | 1 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 |
| US SPRINT | 4 | 0 | 1 | 2 | 9 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 18 |
| UUU | 1 | 0 | 0 | 3 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 11 |
| SUBTOTAL | 38 | 1 | 3 | 43 | 209 | 18 | 1 | 1 | 13 | 4 | 14 | 2 | 347 |

WHOLLY ASSIGNED MIU CAPACITY

| PARTIES | |
|---|---|
| OTC | 2 |
| DBP | 2 |
| KDD | 12 |
| PLDT | 1 |
| BT PLC | 3 |
| AT&T | 36 |
| MCII | 15 |
| SUBTOTAL | 71 |

NOTE: Includes MIUs routed on Subsegment B3

| | |
|---|---|
| TOTAL | 418 |
| (# OF WHOLE MIUS) | |

SUMMARY

| PARTIES | JOINTLY ASSIGNED | WHOLLY ASSIGNED | MIU 1/2 INTERESTS |
|---|---|---|---|
| OTC | 45 | 2 | 49 |
| RTT | 1 | 0 | 1 |
| FT | 5 | 0 | 5 |
| DBP | 9 | 2 | 13 |
| CUHK | 1 | 0 | 1 |
| BTE | 1 | 0 | 1 |
| ITALCABLE | 3 | 0 | 3 |
| IDC | 3 | 0 | 3 |
| ITJ | 43 | 0 | 43 |
| KDD | 209 | 12 | 233 |
| KTA | 18 | 0 | 18 |
| MPTT | 4 | 0 | 4 |
| TCHZ | 2 | 0 | 2 |
| STA | 2 | 0 | 2 |
| CAPWIRE | 1 | 0 | 1 |
| PLDT | 13 | 1 | 15 |
| TELECOMS | 4 | 0 | 4 |
| TELEFONICA | 1 | 0 | 1 |
| ITDC | 14 | 0 | 14 |
| BT PLC | 25 | 3 | 31 |
| MCL | 1 | 0 | 1 |
| AT&T | 191 | 36 | 263 |
| FITC | 1 | 0 | 1 |
| FTCC | 3 | 0 | 3 |
| MCII | 60 | 15 | 90 |
| OTI | 1 | 0 | 1 |
| TRT | 4 | 0 | 4 |
| US SPRINT | 18 | 0 | 18 |
| UUU | 11 | 0 | 11 |
| TOTAL | 694 | 71 | 836 |

SCHEDULE C-1

ASSIGNMENT OF MIUS IN SUBSEGMENT B1
(BU - U.S.)

(HALF INTERESTS)

| PARTIES | OTC | CWIK | IDC | ITJ | KDD | KTA | TCNZ | CAPWIRE | PLDT | TELECOMS | ITDC | MCII-G | SUBTOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| OTC | 0 | 0 | 0 | 0 | 7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 7 |
| RTT | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| TELEGLOBE | 2 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 4 |
| FT | 2 | 0 | 0 | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 5 |
| DBP | 2 | 0 | 0 | 1 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 9 |
| BTE | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| ITALCABLE | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 3 |
| KPTT | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 |
| TCNZ | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| STA | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| TELEFONICA | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| BT PLC | 3 | 0 | 1 | 1 | 21 | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 28 |
| MCL | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| AT&T | 16 | 0 | 0 | 22 | 111 | 15 | 1 | 0 | 12 | 3 | 9 | 2 | 191 |
| FITC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 |
| FTCC | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 |
| MCII | 9 | 1 | 1 | 11 | 34 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 58 |
| OTI | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| TRT | 1 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 |
| US SPRINT | 4 | 0 | 1 | 2 | 9 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 18 |
| ULU | 1 | 0 | 0 | 3 | 6 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 11 |
| SUBTOTAL | 43 | 1 | 3 | 43 | 209 | 18 | 3 | 1 | 13 | 4 | 14 | 2 | 354 |

WHOLLY ASSIGNED MIU CAPACITY

| PARTIES | |
|---|---|
| OTC | 2 |
| DBP | 2 |
| KDD | 12 |
| PLDT | 1 |
| BT PLC | 3 |
| AT&T | 36 |
| MCII | 15 |
| SUBTOTAL | 71 |

| | |
|---|---|
| TOTAL | 425 |
| (# OF WHOLE MIUS) | |

SUMMARY

| PARTIES | JOINTLY ASSIGNED | SOLELY ASSIGNED | MIU 1/2 INTERESTS |
|---|---|---|---|
| OTC | 50 | 2 | 54 |
| RTT | 1 | 0 | 1 |
| TELEGLOBE | 4 | 0 | 4 |
| FT | 5 | 0 | 5 |
| DBP | 9 | 2 | 13 |
| CWIK | 1 | 0 | 1 |
| BTE | 1 | 0 | 1 |
| ITALCABLE | 3 | 0 | 3 |
| IDC | 3 | 0 | 3 |
| ITJ | 43 | 0 | 43 |
| KDD | 209 | 12 | 233 |
| KTA | 18 | 0 | 18 |
| KPTT | 4 | 0 | 4 |
| TCNZ | 4 | 0 | 4 |
| STA | 2 | 0 | 2 |
| CAPWIRE | 1 | 0 | 1 |
| PLDT | 13 | 1 | 15 |
| TELECOMS | 4 | 0 | 4 |
| TELEFONICA | 1 | 0 | 1 |
| ITDC | 14 | 0 | 14 |
| BT PLC | 28 | 3 | 34 |
| MCL | 1 | 0 | 1 |
| AT&T | 191 | 36 | 263 |
| FITC | 1 | 0 | 1 |
| FTCC | 3 | 0 | 3 |
| MCII | 60 | 15 | 90 |
| OTI | 1 | 0 | 1 |
| TRT | 4 | 0 | 4 |
| US SPRINT | 18 | 0 | 18 |
| ULU | 11 | 0 | 11 |
| TOTAL | 708 | 71 | 850 |

SCHEDULE E-2

ASSIGNMENT OF MIUS IN SUBSEGMENT 82
(BU - JA)

(HALF INTERESTS)

| PARTIES | OTC | CWK | IDC | ITJ | KDD | KTA | CAPWIRE | PHILCOM | PLDT | TCNZ | TELECOMS | ITDC | MCII-G | SUBTOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| OTC | 0 | 0 | 0 | 0 | 7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 7 |
| RTT | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| TELEGLOBE | 6 | 0 | 1 | 2 | 9 | 1 | 0 | 4 | 3 | 0 | 1 | 4 | 0 | 31 |
| FT | 2 | 0 | 0 | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 6 |
| DBP | 2 | 0 | 0 | 1 | 6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 9 |
| BTE | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| ITALCABLE | 1 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 |
| NPTT | 1 | 0 | 0 | 1 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 5 |
| TCNZ | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| STA | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| TELEFONICA | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| BT PLC | 10 | 0 | 1 | 1 | 21 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 0 | 35 |
| MCL | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| AT&T | 16 | 0 | 0 | 22 | 111 | 15 | 0 | 0 | 12 | 1 | 3 | 9 | 2 | 191 |
| FITC | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| FTCC | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 |
| MCII | 9 | 1 | 1 | 11 | 34 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 58 |
| OTI | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| TRT | 1 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 |
| US SPRINT | 4 | 0 | 1 | 2 | 9 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 18 |
| WUI | 1 | 0 | 0 | 3 | 6 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 11 |
| SUBTOTAL | 55 | 1 | 4 | 45 | 221 | 19 | 1 | 4 | 16 | 1 | 5 | 18 | 2 | 392 |

WHOLLY ASSIGNED MIU CAPACITY

| PARTIES | |
|---|---|
| OTC | 2 |
| TELEGLOBE | 18 |
| DBP | 2 |
| KDD | 12 |
| PLDT | 1 |
| BT PLC | 3 |
| AT&T | 36 |
| MCII | 15 |
| SUBTOTAL | 89 |

| | |
|---|---|
| TOTAL | 481 |
| (# OF WHOLE MIUS) | |

SUMMARY

| PARTIES | JOINTLY ASSIGNED | WHOLLY ASSIGNED | MIU 1/2 INTERESTS |
|---|---|---|---|
| OTC | 62 | 2 | 64 |
| RTT | 1 | 0 | 1 |
| TELEGLOBE | 31 | 18 | 67 |
| FT | 6 | 0 | 6 |
| DBP | 9 | 2 | 13 |
| CWK | 1 | 0 | 1 |
| BTE | 1 | 0 | 1 |
| ITALCABLE | 4 | 0 | 4 |
| IDC | 4 | 0 | 4 |
| ITJ | 45 | 0 | 45 |
| KDD | 221 | 12 | 245 |
| KTA | 19 | 0 | 19 |
| NPTT | 5 | 0 | 5 |
| TCNZ | 2 | 0 | 2 |
| STA | 2 | 0 | 2 |
| CAPWIRE | 1 | 0 | 1 |
| PHILCOM | 4 | 0 | 4 |
| PLDT | 16 | 1 | 18 |
| TELECOMS | 5 | 0 | 5 |
| TELEFONICA | 2 | 0 | 2 |
| ITDC | 18 | 0 | 18 |
| BT PLC | 35 | 3 | 41 |
| MCL | 1 | 0 | 1 |
| AT&T | 191 | 36 | 263 |
| FITC | 1 | 0 | 1 |
| FTCC | 3 | 0 | 3 |
| MCII | 68 | 15 | 98 |
| OTI | 1 | 0 | 1 |
| TRT | 4 | 0 | 4 |
| US SPRINT | 18 | 0 | 18 |
| WUI | 11 | 0 | 11 |
| TOTAL | 784 | 89 | 942 |

Appendix 4
3 of 3

## FOOTNOTES

[1] On April 24, 1989, WU Worldcom, Inc. assigned its interests in TPC-4 to World Communications, Inc. (Worldcom), pursuant to a Common Carrier Bureau order authorizing the assignment. *See* Western Union Corporation and World Communications, Inc., 4 FCC Rcd 2219 (Com. Car. Bur. 1989).

[2] Three of the eight Joint Applicants (AT&T, MCI and OTI) filed joint reply comments. Two additional Applicants, Fedex and Worldcom, each filed a one-page individual reply, agreeing generally with the conclusions contained in the reply comments filed by AT&T, MCI and OTI.

[3] In addition, on June 1, 1989, The Secretary of Defense filed a petition for leave to intervene and participate in the proceeding, stating that the Department of Defense has a vital interest in the outcome of this matter. DoD has elected not to file comments.

[4] In a separate decision, we also grant the Joint Applicants' request for a cable landing license in File No. S-C-L-89-004 pursuant to the Cable Landing License Act.

[5] All applicants initially may not be certified to serve directly all territories that the facilities covered by the Joint Application are capable of serving. Each individual applicant proposing extensions of its services into such territories by means of the TPC-4 facilities will seek such appropriate authorization as may be required when it proposes to activate the facilities.

[6] *See* Attachment B to the Joint Application (filed March 30, 1989).

[7] The system interface is defined as the nominal 140 Megabits per second digital input/output ports on the digital distribution frame (excluding the frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

[8] A MIU is the minimum unit of ownership investment in the TPC-4 cable system and is the equivalent of 30 MAUOs. Interests of less than 30 MAUOs may be purchased on an IRU basis. A MAUO consists of 64,000 usable bits per second and an additional 9,684.656 bits per second required for multiplexing.

[9] For voice services, circuit multiplication equipment can be employed to derive about 150 virtual voice paths from a MIU.

[10] Table 1 was set forth in the Joint Application at p.14. The attached Appendix 3 shows each party's allocation of the costs (Schedule C of the C&MA) associated with the TPC-4 cable. Appendix 4 shows the capacity in the TPC-4 cable that is assigned to each of the Joint Applicants (Schedules D-1, E-1, and E-2 of the C&MA), upon which the costs are based.

[11] The cost of necessary modifications at the existing cable stations at Point Arena, Port Alberni and Chikura to accommodate TPC-4 are estimated to be approximately $2.7 million, of which the Joint Applicants' share will be approximately $896,000. The remaining $8.9 million of the $11.6 million total for cable station costs are incurred as the result of a reallocation of previously incurred costs from other cable systems sharing the same cable station.

[12] The Joint Application notes, for example, that more than 65 subcontractors from 22 states participated in the construction or provision of materials for the portion of the HAW-4/TPC-3 cable system supplied by AT&T.

[13] The Joint Application advises that TPC-4 will provide double the capacity of HAW-4/TPC-3 at approximately a 35% reduction in system cost, and with unit cost savings that are greater. For example, it notes that the cost of a 64 Kbit/s half-channel in HAW-4/TPC-3 between the U.S. and Japan was $40,000, and that the same half-channel in TPC-4 will cost $12,200.

[14] US Sprint does not join in this statement.

[15] STC states that the statement in the Joint Application that AT&T "will use AT&T's latest 1.55 micron SL560 technology . ." can be interpreted to indicate that AT&T plans to acquire the fiber optic cable on a sole source, non-competitive basis from its incumbent supplier rather than through open competition. STC asserts that this could result in a higher cost for international communications services than would be the case with competitive procurement.

[16] PTC, in turn, is owned by Pacific Telecom, Inc., an eighty percent shareholder, and Cable and Wireless PLC, a United Kingdom company with a 20 percent interest. *See* Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (Com. Car. Bur. 1987).

[17] Fedex and Worldcom also assert that the Joint Application fully complies with these requirements and that PTC has not demonstrated the need for further information or delay in the authorizations sought by the Joint Applicants.

[18] AT&T, MCI and OTI note that, in discussing common carrier use of private cables not subject to Commission planning dockets, this Commission required only that the carriers meet applicable Section 214 requirements. *See Pacific Telecom Cable, Inc.*, 4 FCC Rcd 4454 (1989).

[19] Policy for the Distribution of United States International Carrier Circuits among Available Facilities During the Post-1988 Period (Circuit Distribution Order), CC Docket No. 87-67, 3 FCC Rcd 2156, 2162 (1988) at para. 35.

[20] Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs During the Period 1981-1995 (Pacific Facilities Planning), Notice of Proposed Rule Making, CC Docket No. 81-343, 89 F.C.C. 2d 1205, 1206 (1982).

[21] PTC submits that traffic data must be placed in the public record on a non-proprietary basis for comment by interested parties.

[22] We also have evaluated the TPC-4 proposal pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, and, concurrent with consideration of this Section 214 application, have granted a license to land TPC-4 at Point Arena, California.

[23] *See* Inquiry into Policy to be Followed in Future Licensing of Facilities for Overseas Communications, Notice of Proposed Rule Making, Docket No. 18875, FCC 70-620 (released June 16, 1970); Overseas Communications, 30 F.C.C. 2d 571 (1971).

[24] Pacific Facilities Planning, First Report and Order, 47 Fed. Reg. 57040, 42 Rad. Reg. (P&F) 1157 (1982); Second Report and Order, 102 F.C.C. 2d 353 (1985).

[25] Caribbean Facilities Planning, 3 FCC Rcd 97 (1988).

[26] Overseas Communications, 73 F.C.C. 2d 326 (1979); Policies for Overseas Common Carriers, 84 F.C.C. 2d 760 (1981); North Atlantic Facilities Planning, 3 FCC Rcd 3979 (1988).

[27] It is well established that agencies may change existing procedures as conditions that they address change, or simply as a result of the agency's changed perception of what policies are most important and how best to address them. *See, e.g., American Trucking Ass'ns. v. Atchison, T.&S. F. R. Co.*, 387 U.S. 397, 416 (1967); *NAACP v. F. C. C.*, 682 F.2d 993, 998 (D.C. Cir. 1982). "An agency must, of course, supply a reasoned explanation whenever it modifies or repeals an earlier conclusion. *See, e.g., Greater Boston Television Corp. v. F. C. C.*, 444 F.2d 841, 852 (D.C. Cir. 1970). And the new course of action must itself be rationally grounded in the evidence before the agency. *See NAACP v. F. C. C.*, 682 F.2d 993, 998 (D.C. Cir. 1982)." *GTE Service Corp. v. F. C. C.*, 782 F.2d 263, 269 (D.C. Cir. 1986).

[28] *See* Policy and Rules Concerning Rates for Dominant Carriers (Price Cap Order), CC Docket No. 87-313, 4 FCC Rcd 2873 (1989).

[29] *See* International Competitive Carrier, 102 F.C.C. 2d 812, 829 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986); US Sprint Communications Company Limited Partnership, 4 FCC Rcd 6279, 6284 (Com. Car. Bur. 1989).

[30] *See* Circuit Distribution Order, 3 FCC Rcd 2156 (1988); Tel-Optik, Limited (Private Submarine Cable), 100 F.C.C. 2d 1033 (1985); Establishment of Satellite Systems Providing International Communications (Separate Satellite Systems), 101 F.C.C. 2d 1046 (1985).

[31] AT&T et al. (TAT 7 Order), 73 F.C.C. 2d 248, 256 (1979).

[32] *See, e.g.*, AT&T *et al.* (TAT-9 Order), 4 FCC Rcd 1129, 1131 (Com. Car. Bur. 1988). *See also* Pacific Facilities Planning, 102 F.C.C. 2d at 355.

[33] In contrast to its request here that the Joint Applicants be held to an especially high standard, PTC sought, in a petition for clarification of our private cable policies, a Commission statement that there are no restrictions, beyond the normal Section 214 authorization process, on the use of its private transpacific cable, NPC, by either private line users or common carriers for switched services. We granted PTC's request for clarification, stating that we did not intend to ". . . place special burdens on any carrier making an application for private cable capacity." Pacific Telecom Cable, Inc., 4 FCC Rcd at 4455.

[34] We disagree with PTC that we do not have sufficient capacity and demand information to evaluate the TPC-4 application. The capacity available to the Joint Applicants on HAW-4/TPC-3 is publicly available information. In addition, the Joint Applicants have provided their forecasted circuit demand for HAW-4/TPC-3 and TPC-4. The Joint Applicants provided this data under requests for confidentiality. On August 14, 1989, the Chief, Common Carrier Bureau granted in part and denied in part the FOIA request of Pacific Telecom Cable for access to the circuit activation data. The Bureau granted public access to the aggregate data, but denied access to the carrier-specific and country-specific data, finding that release of the specific data would be likely to cause substantial competitive harm to the Joint Applicants. Our decision here is premised only on the aggregate data. The carrier- and country-specific data were not utilized in making our determination. *See* Letter from Chief, Common Carrier Bureau to Aileen R. Amarandos (August 14, 1989); FOIA Control No. 89-122.

[35] *See infra* paras. 34-46.

[36] In a rate of return environment, detailed oversight and evaluation of the capacity of and demand for a proposed facility and the cost to provide it are required to ensure that ratepayers are not burdened with excessive costs for unnecessary or inefficient facilities. Under rate of return regulation, which establishes a rate of return that a carrier can earn on its investment, a carrier seeking to increase its dollar earnings often can do so merely by enlarging its rate base. Thus, rate base carriers may have the incentive to overbuild facilities at ratepayer expense.

[37] U.S. carriers have a wider choice of facilities than ever before. In addition to the TAT-8 and HAW-4/TPC-3 cables, *see* AT&T et al. (TAT-8), 98 F.C.C. 2d 440 (1984); AT&T et al. (HAW-4/TPC-3), File No. I-T-C-85-219, Mimeo No. 1794 (released January 7, 1986), with their multiple U.S. owners, the private Pacific cable, NPC, is scheduled for operation in 1990. Additionally, carriers may construct their own earth stations and obtain INTELSAT space segment under long-term arrangements that permit carriers to freeze a significant element of the cost of providing service. *See* Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, 100 F.C.C. 2d 250 (1984); Communications Satellite Corporation (Transmittal No. 674), 3 FCC Rcd 1132 (Com. Car. Bur. 1988).

[38] *See* International Competitive Carrier, 102 F.C.C. 2d at 829.

[39] *See* North Atlantic Facilities Planning, 3 FCC Rcd at 3989-90.

[40] *Id.* at 3990; Tel-Optik Limited (Private Submarine Cable), 100 F.C.C. 2d 1033, 1049 (1985); *see generally* Pacific Telecom Cable, Inc., 4 FCC Rcd 4454 (1989).

[41] Pacific Telecom Cable, Inc., 2 FCC Rcd 2686, 2690, n.15 (Com. Car. Bur. 1987).

[42] Notional capacity is the capacity in TPC-4 that is assigned to the Joint Applicants. Schedule F to the Joint Application lists the notional capacity of subsegments B1, B2 and B3 as, respectively, 425 MIUs, 481 MIUs and 70 MIUs. When the cable system becomes fully subscribed, the notional capacity equals the system's design capacity.

[43] The same calculations can be performed for the unit cost per 64 Kbit/s half-circuit that occurs once the notional capacity of subsegment B2 reaches the design capacity of 504 MIUs and subsegment B1 reaches 448 MIUs. Subsegment B1: $49M divided by 26,880 (448x30x2) = $1,823. Subsegment B2: $294M divided by 30,240 (504x30x2) = $9,722. The sum would be $11,545.

[44] *See, e.g.*, North Atlantic Facilities Planning, 3 FCC Rcd at 3986; All America Cable and Radio Inc., et al., 67 F.C.C. 2d 451, 469 (1978).

[45] *See Circuit Distribution Order*, 3 FCC Rcd 2156 (1988), in which this Commission found that the public interest would be served by ending the Commission-mandated circuit distribution guidelines originally developed in 1966 to ensure that submarine cable owners used the INTELSAT satellite system.

[46] *Id.* at 2161.

[47] *Id.*

[48] The estimates of AT&T's IMTS voice paths via satellite, and percentages of such traffic, set forth in Table I of the *Circuit Distribution Order* were based on Common Carrier Bureau staff calculations using AT&T's July 1987 circuit forecasts and certain stipulations set forth in the Comsat/AT&T agreement. *See id.* at 2166, n.19.

[49] *See* Pacific Facilities Planning, 102 F.C.C. 2d 353 (1985).

[50] North Atlantic Facilities Planning, 3 FCC Rcd at 3987.

[51] *See* Pacific Telecommunications, 102 F.C.C. 2d 353, 362 (1985).

[52] North Atlantic Facilities Planning, 3 FCC Rcd at 3989.

[53] Applications have been filed by AT&T, US Sprint, CICI, Inc., FTC Communications, Inc., Overseas Telecommunications, Inc., MCI International, Inc., World Communications, Inc. and Fedex International Transmission Corporation. *See*, respectively, File Nos. ITC-89-146, ITC-89-084, ITC-89-103, ITC-89-104, ITC-89-110, ITC-89-121, ITC-89-134, and ITC-89-135. The Common Carrier Bureau has granted the application of US Sprint. *See* US Sprint Communications Company Limited Partnership, 4 FCC Rcd 6279 (Com. Car. Bur. 1989). Prior to TAT-9, the Common Carrier Bureau authorized Allnet to acquire capacity in PTAT. *See* Allnet Communications Services, Inc., 2 FCC Rcd 6633 (Com. Car. Bur. 1987).

[54] While we rely solely on the record set forth above, we note that AT&T recently has been awarded contracts in the sum of $191 million to construct one-half of TPC-4. *See, e.g.*, Press Release, October 16, 1989 (AT&T awarded $191 million in contracts).

[55] *See, e.g.*, North Atlantic Facilities Planning, 3 FCC Rcd at 3989.

[56] *See* Joint Application at p. 24.

[57] *See supra* n. 1.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**In the Matter of**

PACIFIC TELECOM CABLE, INC. I-S-C-L-86-002-(M)

Application for a License to land and operate in the United States a private submarine cable between the United States and Japan

**CABLE LANDING LICENSE**

**Adopted: October 26, 1989; Released: November 15, 1989**

By the Commission:

1. Pacific Telecom Cable, Inc. (PTC) notified the Commission on April 7, 1989, of its intention to initiate installation in August 1989, of the North Pacific Cable (NPC) with Pacific City, Oregon and Seward, Alaska as the U.S. landing sites for the cable. The notification was made in accordance with paragraph 18(4) of PTC's conditional cable landing license which requires PTC to notify the Commission of the locations at which the cable will land on the shores of the United States prior to commencing construction. In addition, PTC provided information to the Commission which it believes demonstrates that it has complied with paragraph 19 of its conditional cable landing license which requires PTC to demonstrate that U.S. entities have been provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the cable. PTC requests issuance of a final cable landing license.

2. PTC's filing was placed on public notice on April 12, 1989. The National Telecommunications and Information Administration (NTIA) filed comments and Simplex Wire and Cable Company (Simplex) filed an opposition. PTC filed responses to Simplex's Opposition and to NTIA's comments.[1] Simplex filed reply comments to PTC's response. Pursuant to the Cable Landing License Act (Act),[2] we grant a final cable landing license for the reasons set forth below.

**BACKGROUND**

3. The Commission adopted its private submarine cable policy in 1985 to promote competition in the provision of international transmission facilities and services.[3] It then granted a cable landing license to PSI (formerly Tel-Optik Limited) to land and operate a private optical fiber transatlantic cable system (PTAT) between the United States and the United Kingdom.[4] In 1987, pursuant to the Commission's policy, the Common Carrier Bureau granted a conditional cable landing license to PTC to land and operate a fiber optic submarine cable between the United States and Japan pursuant to the policy established in authorizing the PTAT system.[5] The Bureau authorized PTC to sell or lease capacity on the NPC system on a non-common carrier basis.

4. The Bureau imposed two sets of conditions on PTC which PTC must fulfill prior to issuance of a final cable landing license. First, PTC was required to notify the Commission in writing of the precise locations at which the cable will land on U.S. shores no less than 120 days prior to commencing construction of cable landing stations at these locations. The purpose of this requirement was to enable the Commission to assess the environmental impact of the cable under its rules. 47 C.F.R. §§ 1.1301-1.1319. Second, PTC was required to demonstrate " . . . that U.S. entities will be provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable."[6] It also was required to " . . . make all reasonable efforts to ensure participation by U.S. interests in the ownership of the international portion of the Japanese end of the cable and any cable spurs."[7]

5. The PTC filing before us is intended to demonstrate compliance with the above conditions. As to the condition requiring identification of landing sites, PTC notes that Pacific City, Oregon and Seward, Alaska were determined to be the most suitable locations in the Pacific Northwest and Anchorage areas, respectively. In Oregon, the beach manhole and cable joint will be located shoreward of the existing dunes in the Tillamook County parking lot, located at the westerly terminus of Pacific Avenue. The parking lot is located west of and adjacent to the Turnaround Motel, PTC states, adding that the cable will follow Pacific Avenue approximately 400 feet and turn left at Cape Kiwanda Drive. The cable will then follow Cape Kiwanda Drive approximately 4,800 feet to the marine terminal station. In Alaska, the beach manhole and cable joint will be located adjacent to the southeasterly end of runway 30 at the Seward Airport. PTC states that from the beach manhole, the cable will be laid on the northerly side of runway 30 for approximately 5,000 feet and then in a north-easterly direction for approximately 300 feet to the marine terminal.

6. As for the procurement process, PTC believes that it has made every effort to ensure that U.S. entities have had a reasonable opportunity to participate in the program as required by its conditional authorization for NPC. PTC states that NPC procurement was handled through a Procurement Subcommittee, composed of representatives of the three purchasers: C&W, International Digital Communications, Inc. (IDC) and itself.[8] The Subcommittee met numerous times throughout the procurement cycle to prepare a tender evaluation guideline, tender document, conditions of tender and draft contract, issue the request for tenders, receive and evaluate the tenders and negotiate a contract. PTC adds that at all times the three purchasers acted as a joint body on all issues, after due deliberation, and negotiations with all Subcommittee decisions were reached by consensus.

7. PTC states that the purchasers clearly asked in the tender documents for a prime contractor to tender a complete turnkey system.[9] According to PTC, there are five companies worldwide in a position to provide undersea fiber optic cable system contracts on a turnkey basis: American Telephone and Telegraph Company (AT&T); Fujitsu Limited (Fujitsu) and NEC Corporation (NEC) of Japan; Standard Telephone and Cables (STC) of the United Kingdom; and Submarcom of France, which were

invited to bid on the NPC contract. Throughout the procurement process, PTC states, it sought to ensure that Simplex, which it describes as usually a subcontractor to AT&T, was also kept informed of the program status. PTC states that Simplex was the only potential cable supplier invited to bid on the program, in the expectation that Simplex might form a consortium which would bid for the contract on a turnkey basis. PTC states that Simplex was thereby given a direct opportunity to remain aware of and participate in NPC.

8. PTC further states that prior to the release of the invitation to tender for the prime contract for the submarine system, it visited both AT&T and Simplex to familiarize the two companies with the project and to encourage them to bid. It adds that it gave AT&T and Simplex copies of the draft of the invitation to tender for their comments during the time of preparation of the tender document. The invitation to tender was modified to accommodate some of the concerns AT&T expressed in its comments, PTC states.

9. Neither AT&T nor Simplex submitted a prime contractor proposal for NPC. According to PTC, the proposal submitted by Simplex was for the cable portion of the system only and the purchasers did not seriously consider this "non-compliant" bid because obtaining only cable directly from Simplex would have introduced the substantial element of risk of having to incorporate Simplex's cable into another manufacturer's system. The Subcommittee did receive prime contract tenders from NEC, STC and Submarcom, although the Submarcom tender was later eliminated from the evaluation process as non-compliant, PTC states.

10. Because neither of the remaining contractors' systems alone provided acceptable reliability for the high capacity plus spur configuration,[10] the Subcommittee decided to request that NEC and STC jointly propose a common system which adequately resolved the reliability problem on attractive terms. The combined offer met the purchasers' criteria for the best combination of economics and technical quality, PTC states, adding that the offer had additional appeal from the point of view of U.S. interests since the offer included the establishment by STC of a cable manufacturing plant in Oregon. The NPC Purchasers therefore signed a contract with NEC and STC for the cable system.

## COMMENTS

11. *Simplex Opposition*. In its opposition, Simplex contends that PTC failed to comply with the conditions of its license relating to procurement. Simplex alleges that foreign interests dominated the procurement process and that U.S. companies were deprived of a meaningful opportunity to compete. Simplex requests, the Commission, in consultation with the Department of State and other concerned Executive branch agencies, to impose additional requirements upon PTC, including a requirement that a majority of the cable should be manufactured by a U.S. owned company. If the concerned agencies are unwilling to take this step, Simplex urges that a hearing on the facts be held to examine more fully the circumstances of the NPC procurement.

12. Specifically, Simplex recounts that it sought to participate in a consortium composed of NEC, Fujitsu, Ocean Cable Company, Ltd. (OCC)[11] and itself (the Japanese Consortium) for the purpose of responding to the NPC Request for Tender. The consortium submitted a proposal to the NPC purchasers that showed Simplex manufacturing 40 percent of the total length of the cable (3760 km) and OCC the remaining 60 percent, Simplex states. NEC was designated the prime contractor for this turnkey proposal and Simplex adds that it originally agreed to participate in the consortium proposal with the understanding that in exchange for its 40 percent bid, no "agent fees" or similar mark-ups would be applied to the Simplex prices. Simplex further states that when it became convinced that its prices, qualifications and available options might not be adequately represented in the joint bid,[12] it decided to submit a separate bid for manufacture of 100 percent of NPC. Simplex believes that its unit price, after re-bids and negotiations, was the most competitive received, but since acceptance of the Simplex bid would have precluded participation of both the Japanese and British cable manufacturers, the Simplex bid was unacceptable for "internal political reasons".

13. Simplex states that after April 20, 1988, the formal submission date, there followed a period of evaluation and exchanges of correspondance during which Simplex voluntarily reduced both its prices in the Japanese Consortium and its 100 percent bid. Simplex states that when the NPC purchasers decided to request a new proposal -- a combined offer from NEC/Fujitsu and STC -- on September 12, 1989, a proposal was prepared which split the cable manufacture between STC and OCC. Simplex adds that it was invited to participate, in the amount of 14 percent, in the manufacture of the Japanese portion of the total cable and in an effort to remain in the bidding, Simplex extended its 40 percent pricing level to the 14 percent portion. The NPC Purchasers chose not to include Simplex in the combined NEC/STC offer ultimately accepted, Simplex states. Rather, the offer accepted provided that approximately 61 percent of the cable would be manufactured by STC and the remaining portion by OCC.

14. According to Simplex, the outcome of the procurement process was predetermined by the dominant influence of foreign entities and foreign industrial policies. It believes that the ownership structure and procurement process for the NPC relegated U.S. companies to a "backseat" position and U.S. manufacturing interests were entirely excluded from participation in the project. Citing the ownership interests of the cable,[13] Simplex believes it is no mere coincidence that the successful bidders have ownership ties to the purchasers, in addition to whatever ties may exist by virtue of national identity, adding that no U.S. bidders had similar advantages. Simplex also cites the Cable Venture Agreement, which was to be prepared by C&W, as further indication of C&W's dominant interest in the project, as well as C&W's vast experience and expertise in the planning and construction of undersea cables, as compared with the experience of PTI in such matters. Simplex states that it presumes that C&W's comparative expertise had an impact on the decision-making process. Simplex adds further that it is clear that Japanese interests manipulated the procurement process in the imposition of unnecessary fees, scheduling requirements and unfair pricing comparisons.

15. Additionally, Simplex alleges that it was understood by the Japanese bidders that, as a matter of policy, a Japanese manufacturer must be awarded some portion of the cable contract. Citing a series of telexes, Simplex quotes NEC/Fujitsu officials as not rejecting the 100

percent Simplex bid for economic reasons, but rather political reasons.[14] Simplex states that the dominant influence of the Japanese and U.K. interests, coupled with "internal political reasons", led to an outcome which denied Simplex a reasonable opportunity to participate in the manufacture of the cable.

16. Simplex contends that PTC's explanations for not accepting its 100 percent cable bid are specious. It believes that the Request for Tender did not require a turnkey proposal and that the NPC purchasers were free to consider and choose Simplex as the cable supplier. Simplex believes that the NPC purchasers desired to use the Simplex bid as leverage to reduce the prices of other bidders. Simplex also rejects PTC's claim that incorporating Simplex's cable into another manufacturer's system incurred a substantial element of risk because of the quality of Simplex's product and its past successful history of interfacing with other systems. Simplex notes further that the final plan increases the interface risk because of the combination of two cable, three electronics and two fiber manufacturers, as well as two installers and other subcontractors.

17. Finally, Simplex requests that the Commission investigate pricing, design changes after acceptance of the final bid, manufacture location in Oregon, foreign government involvement in financing and whether repeater integration will occur in Japan.[15] Simplex believes that these factors, which may have changed after the close of the formal bidding process, should be investigated and will reinforce evidence that the NPC procurement process was governed by political considerations and not a fair opportunity to compete.

18. *NTIA Comments*. In its initial comments, NTIA states that the Commission did not then appear to have all of the facts concerning the procurement process. Noting that serious allegations of unfair treatment were made by Simplex, in conflict with the terms of the conditional license granted by the Commission, the agency states that a complete investigation of the procurement process is warranted. NTIA concludes that the Commission should withhold grant of a final cable landing license until a sufficient investigation has been conducted.

19. *PTC Response*. PTC maintains that it has fully complied with the conditions of its authorization and has, in fact, exceeded the requirement that it provide reasonable opportunity to U.S. interests to participate in NPC. PTC contends that Simplex's failure to win a portion of the procurement was due to AT&T's decision not to bid, as well as to Simplex's own business decisions and its inability to provide a responsive, competitive bid. PTC opposes the remedies sought, arguing that (1) NPC should not be saddled with a non-competitive supplier; (2) Simplex should not be protected from competition with STC in the United States; (3) imposing a content requirement here could lead to similar action by other governments; and (4) grant of such relief could result in immediate and devasting contractual liability to PTC.

20. PTC states that U.S. interests are well represented in the ownership, construction and operation of NPC with the single largest investment held by PTI. PTI is the U.S. corporation which owns 80 percent of PTC, which in turns owns the United States end of NPC, constituting a 56.63 percent investment share and voting interest in NPC. PTC adds that STC will manufacture in the United States 4,000 km of the total 5,670 km of the cable that STC will manufacture. STC will supply approximately 61 percent of the NPC cable. Thus, 42 percent of the total NPC cable will be manufactured in the United States. PTC notes further that the construction of the cable by STC in Oregon will provide the United States with a second permanent submarine fiber cable manufacturing facility. This plant will serve as a major source for employment and will create more opportunities for U.S.-based plants to participate in cable manufacturing contracts worldwide, PTC states. The plant will offer an important second source of cable for the Department of Defense and for competitive commercial procurement, PTC adds. Finally, PTC argues that the NPC cable has significantly advanced U.S. interests in opening international markets by encouraging foreign prime contractors to consider using a U.S. cable supplier and by increasing competition in U.S. cable supply.

21. In maintaining that it has satisfied the obligations under its conditional authorization, PTC notes that the requirement imposed on it is to provide a reasonable opportunity for participation by U.S. entities. PTC explains that this requirement demands no more than that U.S. entities have a fair chance to participate in the procurement process and compete on their own cost and technical merits. The standard set forth in the PTC authorization does not mandate that U.S. entities actually be selected as contractors or require that PTC's ability to provide effective competition be sacrificed in order to do so, PTC adds.

22. PTC said that NPC decided on a competitive bidding process as the best means of ensuring a reasonable opportunity for U.S. entities to participate in the procurement process of guaranteeing the most cost-effective, competitive facility. PTC characterizes the NPC competitive procurement process as in sharp contrast to commonly used closed bidding processes.[16] The NPC purchasers determined to solicit bids from all prime contractors who would normally be in a position to supply a fully integrated submarine cable system, and also from Simplex. As none of the NPC purchasers had ever acted as a prime contractor on a transoceanic fiber optic cable project and were not prepared to serve in the role of prime contractor, PTC states they decided that a single contract would be negotiated with a separate prime contractor for the supply of the entire integrated NPC system.

23. PTC disagrees that the NPC procurement process was dominated by foreign interests. STC and NEC won a portion of the procurement award solely on the basis of their very competitive bids and not on the basis of their nationality ties to the NPC purchasers, PTC adds.[17] PTC labels Simplex's references to "internal political reasons" requiring Japanese national content in the manufacture of the cable "utterly misleading" because NEC's choice of OCC was based on existing contractual arrangements among those parties. Further, within the Purchasing Subcommittee, each of the three NPC purchasers had equal representation. All decisions concerning procurement were made strictly on a consensus basis and each of the NPC purchasers retained veto power with respect to the procurement award, -- a further indication that the organizational structure of the procurement process permitted PTC to ensure that U.S. interests were given a reasonable opportunity to particpate, PTC explains.

24. PTC states that it took extraordinary steps to encourage participation in NPC by AT&T. AT&T was provided a draft of the Request for Tender, PTC representatives visited AT&T Bell Laboratories and PTC

incorporated AT&T's comments to the Request for Tender, PTC recounts. However, PTC believes that AT&T's decision not to bid seriously diminished prospects of securing a major portion of the procurement contract for U.S. entities. AT&T's withdrawal left Simplex and other U.S. subcontractors with the difficult task of establishing a new relationship with foreign prime contractors, who already had well cemented relationships with their own domestic suppliers, PTC explains.

25. PTC also states that it took special steps to provide advance technical information and invite Simplex to bid, with Simplex being the only subcontractor to receive the Request for Tender. Later, PTC states that it endeavored to preserve Simplex's opportunity to serve as subcontractor in the NEC/STC joint bid by encouraging those parties to include Simplex in their subsequent bid to the NPC purchasers. Further, it states that the NPC purchasers required NEC and STC to answer several detailed interrogatories demonstrating that U.S. interests were being protected when the NEC/STC joint bid was submitted.[18] PTC states that in a final inquiry by it to NEC about the rejection of Simplex's 40 percent, NEC responded that Simplex's price was 30 percent higher than NEC could offer through OCC.

26. As for Simplex's 100 percent bid, PTC maintains that the bid was non-compliant with the terms in the Request for Tender. PTC states the Request for Tender sketched out in detail the system requirements, emphasizing the need for the supply of a fully integrated system. Further, the risks the NPC purchasers sought to avoid had nothing to do with the technical characteristics of Simplex's cable, but were keyed to undertaking the task of system integration and assuming responsibility for the selection of subcontractors, and after system operation, assuming responsibility for problem identification, repair responsibility and contractual liability, PTC adds.

27. PTC further states that all evidence available to the NPC Purchasers showed the Simplex bid to be non-competitive. The subcontractor bid submitted by Simplex was not competitive with the bid submitted by OCC in the Japanese Consortium even without any mark-ups, PTC notes. According to PTC, further comparison of a marked-up OCC bid against the Simplex bid showed Simplex 39 percent higher than OCC, such that even before any NEC surcharges, Simplex's bids were well above the competition. PTC contends that Simplex has not demonstrated that the surcharges were unreasonable or discriminatory to it.

28. PTC charges that Simplex has attempted to place the blame of its failure to participate in NPC on external causes. Imposing the relief requested by Simplex would be devastating to NPC and would be antithetical to the Commission's pro-competitive program, PTC states, because the disruption due to a reopening of the procurement process or substantial delays due to unnecessary investigations would deal a crushing blow to the project in cost and scheduling. Additional conditions -- requiring the majority of the cable to be manufactured by a U.S. owned entity -- would constitute a request for substantial modification of the existing PTC authorization, PTC states. Similarly, PTC states, the full investigation called for by Simplex would have a disastrous impact on NPC as a competitive cable. PTC believes 1) it has already demonstrated unequivocally that Simplex's direct bid was non-compliant and Simplex's subcontractor bid to NEC was non-competitive; 2) it would have been absurd for the NPC purchasers to incorporate design changes that would have disadvantaged Simplex; 3) there is no discernible public interest reason for the Commission to investigate the overall U.S. interest in STC's Portland facility; 4) there is no evidence that there was any government involvement or support for foreign entities in the procurement process, and the NPC purchasers decided not to avail themselves of financing proposals offered by any supplier; and 5) the requirement that repeaters be integrated with the cable in Japan was a part of the private contractual arrangement between NEC and Simplex. In conclusion, PTC believes that the NPC purchasers did everything in their power to ensure a fair and competitive procurement process that would include U.S. entities.

29. In response to NTIA, PTC argues that the agency's comments provide no basis for further delay in granting the application for a final cable landing license. While agreeing with NTIA that Simplex raised serious allegations, PTC states that through its response it has demonstrated unequivocally that it provided every reasonable opportunity for U.S. entities to participate in NPC and that as presented to the NPC purchasers, the Simplex bids were simply non-compliant and non-competitive. PTC states that it has further shown that the NPC purchasers conducted a "fair and equitable competition for all bidders" and PTC has therefore satisfied U.S. trade policy concerns with respect to the PTC procurement.[19] PTC concludes that any concerns that NTIA may have had about Simplex's subcontractor relations with foreign prime contractor bidders are not appropriately considered in the context of PTC's license application. PTC believes that U.S. trade policy actually would be disserved by further delay in the grant of PTC's license and that the lack of publicly available information which prompted NTIA to file its comments at the time has been fully remedied.

30. *Simplex Reply*. In its reply, Simplex labels the PTC response a *post hoc* rationalization that does not satisfy the requirements of the conditional license. According to Simplex, PTC's response does not adequately address the importance of Simplex's 100 percent bid. That bid, which Simplex states it believes to be the lowest bid received for 100 percent of the total cable, was submitted because Simplex never felt NEC provided adequate assurances that Simplex would not be "dealt out" of the process. Simplex claims that the NPC tender documents provided the purchasers with great flexibility in selecting among component parts of the systems if the purchasers chose to do so. According to Simplex, the tender documents gave the purchasers the flexibility to require the successful prime contractor, NEC or STC, to subcontract with Simplex for 100 percent of the cable or for any portion of it. However, Simplex concludes that no matter how attractive its bid, the Japanese and British interests would not allow their national cable suppliers to be foreclosed from the procurement.

31. Simplex maintains that PTC has failed to comply with the conditional license. Simplex asserts that PTC mischaracterizes the obligations imposed on it in the conditional license by referring to them as "unnecessary and inequitable regulatory impediments." Simplex points out that PTC accepted the conditions which permit the Commission to impose future requirements if necessary. Further, Simplex argues that PTC cannot use pre-authorization expenditures as a basis for obtaining

final authority, nor can it diminish its responsibility by understating its ability to intervene with foreign manufacturers.

32. Additionally, Simplex contends that PTC has relied upon false and self-contradictory NEC assertions in providing information to the Commission regarding the procurement. According to Simplex, no binding agreement existed for the 40/60 percent ratio in favor of OCC between NEC and Simplex. Simplex states PTC should have sought independent confirmation of NEC's assertion. Simplex explains further that if such an agreement existed with regard to it and NEC, the same agreement would apply to OCC such that OCC would also be unable to supply 100 percent of the cable. Simplex states that the final contract, with OCC providing 100 percent of the NEC portion of the cable, contradicts the representations made to PTC by NEC. Simplex further states that PTC's interpretation of the telexes, including one which referenced "internal political reasons" as reflective of contractual arrangements between NEC and OCC is incorrect. Even if the arrangement were contractual, Simplex charges that the opportunity for Simplex to participate in the NPC procurement by providing a portion of the NEC-supplied cable would have been undercut. Simplex also maintains that its 100 percent bid was in compliance with the tender documents and that the NPC purchasers had enormous flexibility to select from among contractors and subcontractors. Simplex acknowledges that a "turnkey" bid may have been preferable to the NPC purchasers, but argues that it is not unreasonable to interpret the request for tender in light of Section 6(c)[20] as permitting a cable-only bid.

33. Simplex states that PTC's expectation that Simplex could act as its own prime contractor was "disingenuous", particularly since PTC states there were only five entities worldwide that were able and willing to act as prime contractors. Simplex also calls into question whether reliability will be improved by the final award which abandons a single prime contractor in favor of two prime contractors from different countries. It reiterates its request for a factual investigation of the NPC procurement process, with specific attention focused on the imposition of fees by NEC, the capacity of the STC Oregon facility, repeater integration, design change and other issues.

34. *State Department Review*. Finally, in accordance with Executive Order No. 10530,[21] the Commission solicited the Department of State's position as to whether a final cable landing license should be issued to PTC.[22] The State Department responded that it had reviewed pleadings submitted in this proceeding and it would support an investigation of the NPC procurement process if considered necessary by the Commission in determining whether PTC has complied with its license conditions.[23] It further stated that it supports the Commission's grant of a final license to PTC, subject to license conditions which the Commission considers appropriate to ensure satisfaction of U.S. commercial interests.

## DISCUSSION

35. In determining whether to grant PTC a final cable landing license, we must resolve two outstanding issues: (1) whether PTC has satisfied paragraph 19 of its conditional authorization and has made sufficient efforts to ensure that U.S. entities were provided a reasonable opportunity to participate in the procurement of the cable; and (2) whether the proposed sites for landing the cable present any environmental concerns that require further action pursuant to our rules. We find below that PTC has fulfilled its obligations under paragraph 19 of its conditional authorization and that the proposed sites for landings do not require further evaluation under our environmental rules. Accordingly, we grant a final cable landing license to PTC.

### A. *Opportunity for Participation by U.S. Interests in the Procurement Process*

36. At the outset, it is useful to provide a framework for the ensuing discussion by setting forth certain of the key events in the procurement process which are not contested by the parties. On February 10, 1988, the NPC Purchasers sent invitations to tender to six potential suppliers, AT&T, Fujitsu, NEC, Simplex, STC and Submarcom. The invitations to tender requested bids on two configurations for the NPC cable: (1) a U.S.-Japan system; and (2) a U.S.-Japan system with a spur to Alaska. On February 24, 1988, AT&T notified the NPC purchasers that it would not submit a bid on the NPC cable. On April 20, 1988, the NPC Purchasers received four tender proposals. These proposals were submitted by: a consortium consisting of NEC, Fujitsu, Simplex and OCC; Simplex; STC; and Submarcom.

37. Under the NEC/Fujitsu/Simplex/OCC (NEC Consortium) tender proposal for a complete cable system, OCC would have provided 60 percent and Simplex 40 percent of the total cable for the NPC cable system. Simplex's separate tender proposal was for 100 percent of only the cable to be used in the NPC cable system.[24] The STC and Submarcom tender proposals both offered complete cable systems. However, Submarcom's tender proposal did not include an offer for the requested second configuration for NPC specifying a U.S.-Japan cable with a spur to Alaska. On May 20, 1988, the NEC Consortium reduced its prices. Simplex reduced its prices for both its subcontractor bid with the NEC Consortium and its separate bid for 100 percent of the cable on May 27, 1988. On July 20, 1988, the NEC consortium again reduced its prices.

38. The NPC Purchasers found that the Submarcom proposal was non-compliant with the invitation to tender because of Submarcom's failure to include an offer for configuration 2 for the NPC cable system. Simplex's separate bid for 100 percent of only the cable for the NPC cable system was also found to be noncompliant because the NPC Purchasers considered that their invitation for tenders had requested proposals for a complete cable system on a turnkey basis.

39. After the review of the tender proposals, the NPC Purchasers decided to pursue a high capacity system with three traffic bearing fiber pairs operating at 420 megabits per second (Mb/s). According to the NPC Purchasers, neither the NEC Consortium nor the STC proposals provided suitable reliability. Because of the differences in the NEC Consortium and STC approaches to redundancy, the NPC purchasers believed that a combination of the NEC Consortium and STC proposals would offer the best technical proposal at the lowest overall cost. On September 12, 1988, the NPC Purchasers requested the NEC Consortium and STC to make a combined offer proposal.

40. The NEC Consortium and STC made a combined offer presentation on September 28-30, 1988 and submitted a combined offer proposal on October 26, 1988. Sim-

plex was permitted to bid on 40 percent of the NEC Consortium's portion of the NPC cable system. Under this combined offer, Simplex's share would have been 14 percent of the total cable for the NPC system. Simplex extended the unit price it offered for its 40 percent subcontractor bid to this 14 percent subcontractor bid. When the combined NEC/STC offer was made, two prices were quoted, one with Simplex providing 40 percent and OCC 60 percent of the NEC Consortium's portion of the cable and the other with OCC providing 100 percent of the NEC Consortium's portion of the cable. The price for the 100 percent OCC provided cable was $13 million lower than the price for the 40/60 Simplex/OCC provided cable, according to the NPC Purchasers. The NPC Purchasers selected the lower cost option of OCC providing 100 percent of the NEC Consortium's portion of the cable. A STC/NEC "Letter to Proceed" was signed on December 17, 1988 and letters of Tender Non-Acceptance where sent to Submarcom and Simplex on December 20, 1988.

41. *Standard of Review*. When it granted PTC a conditional cable landing license, the Common Carrier Bureau concluded that authorization of PTC's proposed system would stimulate competition in the provision of service in the Pacific Ocean region, promote technological development, and provide the same user-benefits that are offered by the private sale of domestic satellite transponders.[25] As a condition to receiving final authorization, the Bureau, in paragraph 19 of its order, required PTC to demonstrate that U.S. entities were provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable.[26] The Bureau was concerned that the proposed system not harm U.S. interests. The condition that U.S. entities be given the opportunity to participate in the manufacture and other aspects of the cable was intended to support U.S. telecommunications business interests by assuring that owners of the cable did not favor foreign entities over U.S. entities once a cable landing license is granted. The condition was consistent with the overall policy thrust of the Commission's *Private Cable Decision* to increase competition in international telecommunications. In effect, it extended that policy beyond the provision of facilities and services to other aspects of any private cable system, including, but not limited to its manufacture and operation.

42. The Bureau did not establish specific guidelines concerning PTC's compliance with the condition in paragraph 19, nor did it detail procedures which had to be followed. Thus, in assessing PTC's efforts to comply with the condition, our standard of review is reasonableness. We must determine whether PTC made sufficient efforts to ensure U.S. entities a reasonable opportunity to participate in the procurement and whether PTC exercised reasonable business judgment in an increasingly competitive market. We will not interject ourselves into every detail of a lengthy procurement process, nor resolve every factual disagreement which has been raised. Rather, we will more appropriately review PTC's efforts in the context of achieving our overall policy objectives and ensuring that license conditions have been met.

43. We emphasize, however, that while we seek the widest possible opportunity for U.S. industry participation in all aspects of the NPC system, the condition imposed in paragraph 19 of PTC's conditional license was not intended to guarantee U.S. involvement in any particular aspect of the procurement. We believe that Commission imposition of a U.S. content requirement or mandate would be inconsistent with our policy objective of achieving competition in the provision of international facilities.[27] Such action could ultimately disserve U.S. telecommunications users.

44. Further, the condition in paragraph 19 recognized the significant involvement of foreign interests in the project, and sought to ensure fair opportunities for U.S. interests in light of the existing foreign involvement.[28] However, in reviewing PTC's actions to comply with the condition, we will not supplant the business judgment of the licensee to determine what combination of system design and costs would be competitive in the provision of facilities and services. The NPC Purchasers are making a substantial investment in a cable system at their own risk in a highly competitive environment and have significant incentives to procure a low cost, reliable system that will enable them to be competitive with other international transmission facilities.

45. *Reasonable Opportunity Was Provided by the Procurement Process*. We find that PTC has made sufficient efforts to ensure U.S. entities a reasonable opportunity to participate in the NPC procurement process. First, the NPC Purchasers initially employed a competitive bidding process to obtain offers from prospective cable system suppliers. In the competitive bidding process adopted by the NPC Purchasers, all potential prime contractors *and* Simplex were afforded the opportunity to respond to the Request for Tender. Competitive bidding was not specifically required by paragraph 19 of PTC's conditional license. However, from a policy standpoint, we believe that it is a desirable means of obtaining a competitive system, while providing U.S. suppliers with a fair opportunity to participate in the procurement. As noted by PTC, the procurement of common carrier submarine cable facilities generally does not involve an open competitive bidding process.[29] In comparison, the competitive bidding process initially used by the NPC Purchasers assured all prime contractors, worldwide, an opportunity to bid to supply the facilities, services and manufacture of the NPC system, and provided the NPC Purchasers with an opportunity to evaluate the universe of prime contractors to achieve a competitive system.

46. Second, PTC provided two U.S. companies --- AT&T and Simplex - - the opportunity to participate in the formulation and content of the Request for Tender. The other potential prime contractors and cable subcontractors had no such opportunity to tailor the Request for Tender to meet the recommendations, capabilities or other special interests. PTC visited AT&T facilities and gave both AT&T and Simplex an opportunity to comment on the draft Request for Tender. The NPC Purchasers incorporated some of the comments it received in the final Request for Tender. Nevertheless, AT&T decided not to bid in response to the final Request for Tender.

47. Third, the Request for Tender included the flexibility for creation of a consortium. The commitment to the creation of independent consortia is demonstrated in the fact that PTC sent Simplex a copy of the Request for Tender at a time when it was still expected that AT&T would bid as a prime contractor on the NPC system and possibly use Simplex as a subcontractor on its bid. PTC included Simplex at the outset with the possibility that it might also form its own consortium without AT&T. After

AT&T indicated that it would not submit a bid, Simplex's potential for participation became through a consortium which it sought to form with NEC and Fujitsu.

48. *There Is No Basis Upon Which to Conclude that the Process was Pre-determined.* We conclude that the process instituted by the NPC Purchasers was not designed to pre-determine the outcome to favor foreign interests. First, PTC's efforts to open its bidding process to all prime contractors on its face is inconsistent with the argument that the process had a pre-ordained result. If the NPC Purchasers had been interested in limiting participation in the project, it would have been much simpler for them to open the bidding process only to selected interests.

49. Second, the ownership scheme of the NPC system does not give dominant influence to foreign interests. According to PTC the U.S. end owned by PTC and controlled by PTI constitutes 56.63 percent investment share and voting interest in NPC. The Japanese end accounts for 43.37 percent equity participation and is owned by IDC (70 percent) and C & W. The overall U.S. interest, through PTI (the parent company of PTC) is 45.30, with IDC's ownership interest being 30.36 percent. C & W's interest, aggregating its overall interests at the U.S. and Japanese ends, is 28.93 percent. PTC notes further that the NEC and Fujitsu investment in the NPC system represent only a 1.46 percent ownership interest. Additionally, as we have stated in note 25, Pacific Telesis and Merrill Lynch hold 8.9 and 2.4 percent interests, respectively, in IDC and rank as the third and fifth largest shareholders. Finally, the NPC Purchasers made procurement decisions through a joint management committee that had equal representation from all of the NPC owners and made its decisions on a consensus basis.

50. Third, we agree with PTC that the NPC venture has increased competitive opportunities for U.S. firms internationally and created an environment where foreign interests have had to seriously negotiate with U.S. companies. U.S. interests may also benefit from the opening of a U.S. cable manufacturing facility by STC in Oregon. In addition, NPC as a whole represents the development of facilities-based competition in international services, which will in turn facilitate further opening of foreign markets.

51. Fourth, PTC's special efforts to involve U.S. suppliers in the procurement process by inviting AT&T and Simplex to see the draft version of the Request for Tender and by pressing NEC to include Simplex in the final bid belie arguments that the procurement process was predetermined. We reject Simplex's allegations that these efforts were disingenous. PTC was clearly attempting to keep Simplex involved in the procurement process even after AT&T decided not to bid as a prime contractor. Although Simplex's bid to provide 100 percent of the cable alone was rejected as non-compliant, the NPC Purchasers reviewed it.[30] Additionally, PTC made efforts to have Simplex included in the Japanese end of the cable in the second bidding phase of the procedure. However, as we discuss below, this effort was unsuccessful because the Simplex bid was viewed as non-competitive. Given the overall attention that PTC focused on the Simplex bids, we cannot conclude that these efforts were "disingenuous."

52. Finally, Simplex was not the only potential participant contacted by the NPC Purchasers to be rejected in this process. All of the original bids were rejected and the final bid represents a hybrid among two previously competing interests. In the first bidding round the NPC Purchasers rejected STC, Submarcom, the Japanese Consortium and Simplex's 100 percent bid. Thereafter, in asking NEC, Fujitsu and STC to work jointly on a subsequent bid that would include Simplex, the NPC Purchasers sought to include all the bidders that had submitted a bid in the first round except Submarcom. PTC explains that the Submarcom bid was non-compliant in that it did not include the Alaska spur.

53. In sum, we find that PTC provided U.S. interests a reasonable opportunity to participate in the bidding process and a fair chance to compete on cost and technological merits. PTC, in conjunction with the other NPC purchasers, made extraordinary and consistent efforts to assure that AT&T *and* Simplex were involved in every phase of the procurement process. The procurement process was conducted in an open environment and even in instances where Simplex's bids were non-compliant, PTC gave Simplex fair and continuing consideration.

54. *Simplex requests for investigation and relief.* Simplex asks the Commission to review PTC efforts to assure U.S. participation in the procurement process in two contexts: 1) Simplex's 100 percent bid; and 2) Simplex's attempts to participate in the Japanese Consortium bid as the cable supplier. We believe that as a matter of policy, the depth of investigation requested by Simplex would be overly intrusive into the business judgment of PTC, which must operate at its own risk in an intensely competitive environment. Further, we find that an investigation to elicit additional facts beyond those which have already been established in the record is unnecessary to conclude PTC has fulfilled the condition contained in paragraph 19 of its conditional license.[31]

55. As to Simplex's 100 percent bid, we conclude that PTC and the other NPC Purchasers acted reasonably in ultimately rejecting this Simplex proposal as non-compliant with the Request for Tender. The issue here appears to turn on how the Tender documents are interpreted. PTC and the other NPC Purchasers are in the best position to determine what their tender documents intended.[32] Nevertheless, it is clear from the Request for Tender that the NPC Purchasers were seeking an integrated system from a prime contractor. In the cover letter that accompanied the Request for Tender the NPC Purchasers stressed their desire to receive bids *only* from prime contractors operating on a *turnkey* basis. Thus, when Simplex offered a 100 percent cable only bid that did not meet the requirements of a turnkey system, the NPC Purchasers were faced with a response to the Request for Tender that was both non-compliant and otherwise non-responsive.

56. From Simplex's description of its involvement with the Japanese Consortium, it would appear that it originally recognized the "turnkey" requirements in the tender request and only decided to submit its 100 percent bid when it felt that the Japanese Consortium represented Simplex's interest to a disadvantage. Simplex's recognition is consistent with PTC's expressed intentions that Simplex could possibly form a consortium. Simplex, however, was expecting the NPC Purchasers, and not itself, to form any consortium that would include Simplex as the cable supplier and other subcontractors to supply the balance of the system. PTC has explained that the NPC Purchasers were intent on avoiding the responsibility of forming a consortium themselves. They felt that the risks of system integration, coordination among subcontractors, problem

identification, repair and contract liability were best avoided by placing full responsibility elsewhere, specifically, in the adoption of a turnkey scheme.

57. There is no basis for the Commission to challenge PTC's view that an integrated system is desirable from a competitive standpoint. Further, we do not regard the request by the NPC Purchasers for a combined NEC/STC bid as inconsistent with its desire to have an integrated system. By linking NEC and STC, the NPC Purchasers still managed to procure an integrated system for which their prime contractors have overall responsibility. We find there is no need to disturb the NPC Purchaser's judgment not to consider Simplex's 100 percent bid, which would have required the NPC Purchasers to gather other contractors to provide the balance of the NPC system and take the risks of integration themselves.

58. Further, we conclude that PTC acted reasonably with respect to Simplex's efforts to become part of a consortium as a cable supplier. Simplex sought to join with NEC and Fujitsu for a 40/60 percent split in the manufacture of the cable portion of the NPC system. However, according to Simplex, although its Japanese partners had assured it that no additional costs or mark-ups would be added to the Simplex bid, costs apparently were added to its prices that were not similarly reflected on the bid from OCC. Simplex also states that PTC treated it unequally in not giving Simplex the opportunity to bargain once the NPC Purchasers decided to go with more than one prime contractor. Simplex states it should have been able to negotiate its subcontractor bid with the final contract price from NEC/STC.

59. PTC's analysis of the Simplex September 1988 subcontractor bid in the second bidding phase showed that the Simplex price was in excess of that offered by NEC/OCC. According to PTC, Simplex's September bid for 40 percent of NEC's portion of NPC (14 percent of the total cable) was higher even before the alleged NEC mark-ups (as a result of imposition of fees) than either the OCC or STC bids. PTC asserts that Simplex's bid for 4 pair lightweight cable, which comprises 70 percent of the total NPC cable, was $14,595 per kilometer (km). The October 1988 final contract price for the NEC portion using OCC cable was $10,470 per km. PTC states that, while this latter price undoubtedly included some mark-ups of OCC's subcontractor bid, comparing this price with Simplex's unmarked-up bid indicates that Simplex's bid is still 39 percent higher than OCC's. Likewise, according to PTC, Simplex's subcontractor bid for 4 pair lighweight screened cable (comprising approximately seven percent of the total NPC cable) was $17,920 per km compared to OCC's price of $11,740 per km, or 53 percent higher. PTC further states that these Simplex prices for 4 pair lightweight cable and for 4 pair lightweight screened cable were, respectively, 43 and 54 percent higher than the STC bid for like cable. Overall, the NPC Purchasers concluded that acceptance of the NEC bid including Simplex cable would have increased the price of the NEC bid by $13 million, according to PTC.

60. Simplex does not deny that its September subcontractor bid was higher. Rather, it argues that it is unfair to compare its bid with the October final contract price because it was not permitted to participate in the final negotiations. However, it is apparent that Simplex did not participate in the final negotiations because the NPC purchasers viewed the Simplex bid as non-competitive with the other cable suppliers. It is neither necessary nor desirable for the Commission to review every detail of the procurement or substitute its judgment for the NPC Purchasers by comparing bids itself. We believe that competitive pressures on the NPC Purchasers push them to procure the least cost system that meets their design specifications. Further, it would be inconsistent with our overall policy objectives to require NPC to accept what it concluded to be a more expensive system in a highly competitive market. Therefore, we decline to further investigate the allegations of Simplex concerning this aspect of the procurement process.

61. With regard to the capacity of the STC Oregon facility, repeater integration and alleged design change, we agree with PTC that these are matters best left to the business judgment of the NPC Purchasers. Simplex raises no substantial and material question of fact that would warrant an investigation by the Commission into these matters. We will not put ourselves in the position of monitoring continuing, and possibly minute, design changes. This, of course, carries over to the use and design of repeaters in Japan. Additionally, we accept PTC's explanation that no government financing has been accepted from any source.

62. We recognize that not all of the factual questions raised by Simplex have been completely answered, but we do not believe that Simplex's allegations merit overturning the NPC contract award to NEC/STC or a further factual investigation. The Commission should not substitute its judgment for that of the NPC Purchasers by reviewing the details of the bids. Indeed, it appears that Simplex's primary problem was with the establishment of new business relationships once AT&T decided not to bid as a prime contractor. AT&T's decision made Simplex's attempt to participate in the procurement more difficult. However, it did not impose a higher standard on PTC in complying with the conditions of its license. On the whole, we conclude that PTC made sufficient efforts to ensure U.S. entities a reasonable opportunity to participate in the procurement and that the business decisions that the NPC Purchasers made at their own risk in an increasingly competitive market were reasonable and should not be disturbed by regulatory action.

63. *U.S. Participation Has Been Preserved.* Finally, although Simplex will not be involved in the construction or manufacture of the NPC system, we find that U.S. participation in the procurement of the NPC system is preserved. Forty-two percent of the cable will be manufactured at STC's Oregon facility. The optical fiber for the cable is being supplied by a U.S. manufacturer. Further, U.S. suppliers are providing 90 percent, by value, of the total of the cable's raw materials and STC is making efforts to locate other qualified U.S. sources for the remaining balance of raw materials. There also remains the possibility that additional U.S. industry opportunities will arise in the operation and maintenance of the NPC system. In the total analysis of the accepted tender offer, there is insufficient support for the view of a predetermined exclusion of U.S. participation even though AT&T chose not to bid as a prime contractor and Simplex did not prevail in any of its attempts to participate.

**B.** ***Environmental Review***

64. As a final matter, we must determine whether the landing of the cables at the proposed points may significantly affect the environment. On October 3, 1989, PTC

filed a statement certifying that the construction of the NPC system will not cause significant harm to either the environment or to any historical sites at the landing points at Pacific City, Oregon or Seward, Alaska. Based on the information provided to us, we find that the proposed construction will not have a significant impact on the environment within the meaning of Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4335. Consequently, no additional information is required as part of this application and the applicant may land the proposed cable at the Pacific City, Oregon[33] and Seward, Alaska sites.

65. In view of the foregoing, the Commission hereby GRANTS AND ISSUES, under the provisions of an Act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39) and Executive Order 10530, 3 C.F.R. 1954-1958 Comp., p. 189 (1961) *reprinted in* 3 U.S.C.A. Section 301 at 1052 (1985) (delegating to the Federal Communications Commission certain presidential functions relating to submarine cable landing licenses), to Pacific Telecom Cable, Inc., a final license to land and operate a high-capacity fiber optic digital transmission submarine cable with 6 working fibers, associated regenerators and supervisory circuits and a capacity of over 1260 Mbps, the western end of the cable landing at Pacific City, Oregon and Seward, Alaska and the eastern end landing at the island of Honshu in Japan. This license is subject to: (1) "An Act relating to the landing and operation of submarine cables in the United States." 47 U.S. §§34-39; (2) subsequent applicable acts; (3) all rules and regulations of the Federal Communications Commission made pursuant to authority vested in it; (4) any treaties or conventions relating to communications to which the United States of America is or may hereafter become a party; (5) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying or amending any rights occurring to any person hereunder; and (6) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view of protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) Neither this license nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(4) The Licensee or any persons or companies controlling it or controlled by it do not enjoy and shall not require any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling it or controlled by it are parties;

(5) The Licensee shall maintain no less than a fifty percent ownership and voting control share in the proposed cable, including one hundred percent ownership in the cable station in Oregon and in Alaska (and any additional U.S. landing points) and in the U.S. land portion of the cable from the station to the U.S. beach joint of the submersible portion of the proposed cable;

(6) The Licensee shall make all reasonable efforts to ensure continued participation by U.S. interests in the ownership of the Japanese end of the international portion of the cable and in any cable spurs;

(7) The Licensee shall, by application, seek Commission approval prior to the sale or transfer to a foreign entity of five percent or more in the aggregate of U.S. owned and controlled PTC stock;

(8) This license is subject to future modification which may be determined necessary by the Secretary of State to protect U.S. interests as a result of: (a) the sale or lease of capacity to particular foreign or domestic entities; or (b) contracts awarded to particular foreign or domestic entities for the design, construction, installation, operation or maintenance of the proposed cable;

(9) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach of nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(10) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from such date, unless renewed or extended upon proper application duly filed no less than six months prior to the expiration date; and upon expiration of the license, all rights granted under it shall terminate; and

(11) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this conditional cable landing license.

66. IT IS FURTHER ORDERED that PTC's motion to accept late-filed comments on the NTIA comments is GRANTED.

67. IT IS FURTHER ORDERED that Simplex's Opposition is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] Concurrent with the filing of these comments, PTC filed a Motion for Leave to File Pleadings Out of Time explaining that NTIA's comments were filed on the same date that PTC had filed its response to the Opposition of Simplex. This precluded PTC from having an opportunity to respond to NTIA earlier. PTC's motion is granted.

[2] An Act Relating to the Landing and Operation of Submarine Cables in the United States, Public Law 8, 67th Congress, 42 Stat. 8, 47 U.S.C. 34-39 (May 27, 1921).

[3] Tel-Optik Limited, 100 FCC 2d 1033 (1985) (*Private Cable Decision).*

[4] Cable Landing Licenses, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, Mimeo No. 4618 (released May 17, 1985).

[5] Pacific Telecom Cable, Inc. 2 FCC Rcd 2686 (1987) (*Conditional License).* PTC is a Delaware corporation, of which 80 percent is owned by Pacific Telecom, Inc. (PTI), a Washington state corporation, and 20 percent is owned by Cable and Wireless, plc (C&W), a public limited company organized under the laws of the United Kingdom.

[6] *Conditional License*, 2 FCC Rcd at 2688-2690. On June 23, 1989, the Bureau granted a PTC request for waiver to allow construction of the cable termination buildings at Cape Kiwanda in Pacific City, Oregon and Seward Airport in Seward, Alaska. Letter from Gerald Brock, Chief, Common Carrier Bureau to Dennis W. Elliott, Executive Vice President and General Manager, Pacific Telecom Cable, Inc.

[7] *Id.*

[8] C&W owns 30 percent, and IDC 70 percent, of the Japanese end of the NPC system.

[9] PTC elaborates in its responsive comments that " . . . a turnkey" system refers to a system whose component parts are entirely integrated by a prime contractor, requiring the purchaser to have no independent dealings with subcontractors and leaving overall responsibility and liability for the successful integration of the various parts of the system in the hands of a prime contractor." Reply comments at 29-30.

[10] PTC explains that the request for tender had included a requirement that two configurations be submitted with the bids: Configuration #1, for a direct U.S.-Japan system and Configuration #2, for a U.S.-Japan system with a spur to Alaska.

[11] OCC is a Japanese-owned cable manufacturing company.

[12] Simplex states that fees amounting to 25.5 percent were added by NEC and Fujitsu to Simplex's portion of the cable. These fees included: three percent for "governmental insurance", 1.5 percent "agent" fee, five per cent "management" fee, 1.7 percent for "liquidated damages", 8.7 percent for "laying schedule disadvantage" and a 5.6 percent "repeater spacing disadvantage" fee. Simplex adds that NEC and Fujitsu insisted on providing the NPC purchasers with a proposal that segregated the Simplex and OCC quotes. According to Simplex, the imposition of fees, apparently only upon it, made Simplex's unit price higher which, when coupled with the economies of scale in cable manufacture, also made Simplex's unit price for its 40 percent of the cable appear less competitive.

[13] Simplex states that C & W has an interest in the eastern portion of the cable through its 20 percent ownership of PTC, as well as a 30 percent outright interest in the western portion of the cable. The remaining 70 percent of the western portion is owned by IDC, whose shareholders include C. Itoh & Company, C & W, NEC and Fujitsu.

[14] Simplex Opposition, Exhibit C-3 (May 12, 1989) ("(AAA) Due to our internal political reasons, we can not eliminate Japanese cable manufacturer.")

[15] In calling for Commission investigation, Simplex states that it believes that its bid for 100 percent of the cable was highly competitive and that certain events that may have taken place after the bid closing, which Simplex cannot independently confirm, reinforce that view. How these issues were resolved leads Simplex to the conclusion that procurement decisions were made on the basis of national content, rather than fair and open competition. Simplex thus requests the Commission obtain comparative price information; and investigate contract variations that might reflect an initial "low-ball" bid, how much of the cable will actually be manufactured in the United States, whether any of the successful bidders received concessionary financing from governmental sources and whether the integration of repeaters must occur in Japan.

[16] NPC is the only transoceanic cable system that, to date, has been subject to any procurement constraints imposed by the Commission, PTC states, noting that PTAT was not subject to any procurement related conditions and that AT&T normally eschews competitive bidding and awards itself the prime construction contract for its own end of the cable.

[17] PTC states that NEC and Fujitsu are two of 144 shareholders of IDC and NEC's and Fujitsu's combined shares in IDC represent only a 1.46 percent interest in the NPC project.

[18] PTC explains that the NPC Purchasers pressed NEC further to allow Simplex to bid on 100 percent of NEC's portion of the cable in the second bidding phase. According to PTC, NEC said it was contractually bound to a 40/60 percent split of the cable in favor of OCC. When this response was weighed against the fact that OCC was the traditional supplier of NEC's submarine cable systems, PTC states it did not feel it could reasonably interfere with NEC's prior agreements.

[19] PTC notes that other U.S. interests include U.S. ownership particiption in the Japanese end of the cable, promotion of increased competitive opportunities in domestic U.S. cable manufacture and development of U.S. facilities-based competition in international services which will facilitate further opening of foreign markets.

[20] Simplex quotes Article 6(c), Volume 1, Part 1, of the Tender Documents:

> "The Purchasers reserve the right to accept all or *any part of a Tender, or any combination of parts of a Tender*, or to accept or reject any Tender without stating any reasons whatsoever. In addition, the Tenderer is required to confirm that he would be prepared to work in cooperation with, *or subcontract to*, or *act in the capacity of subcontractor to*, another NPC system manufacturer." (Emphasis added by Simplex).

[21] 3 C.F.R. 1954-1958 Comp., p. 189 (1961), *reprinted in* 3 U.S.C.A. Section 301 at 1052 (1985).

[22] Letter from George Li, Chief, International Facilities Division, Common Carrier Bureau, to Randolph C. Earnest, Director, Office of Satellite and Cable Policy, Department of State (dated June 7, 1989). By Executive Order No. 10530, the Commission was delegated the responsibility of processing applications and issuing licenses pursuant to the Cable Landing License Act. This authority was conditioned upon the Commission's not granting or revoking licenses without first obtaining approval of the Secretary of State and any advice from any executive branch department or establishment of the Government as it may deem necessary.

[23] Letter from Randolph C. Earnest, Director, Office of Satellite and Cable Policy, to George Li, Chief, International Facilities Division, dated August 15, 1989.

[24] Simplex's tender proposal did not include underwater repeaters, shore terminal equipment and other components which comprise a total submarine cable system.

[25] *Conditional License* at 2687. These benefits include: 1) permitting the providers of capacity to make tailored and flexible arrangements with customers that are not possible under the regimen of a tariffed service offering; 2) enabling customers to make long-term plans for the use of facilities with assurance as to facility availability and price; 3) permitting systems to be designed specifically to meet customer needs; and 4) facilitating positive market development for new and innovative service offerings.

[26] The *Conditional License* granted to PTC also required it to "make all reasonable efforts to ensure participation by U.S. interests in the ownership of the Japanese end of the international portion of the cable and any cable spurs." *Conditional License*, 2 FCC Rcd at 2689. We conclude that this condition has been satisfied for purposes of granting final authority. It was not a matter of contention raised by Simplex in this proceeding. We observe that PTC indicates that, as of May 29, 1989, two U.S. corporations, Pacific Telesis and Merrill Lynch, hold 8.9 and 2.4 percent interests, respectively, in IDC and rank as the third and fifth largest IDC shareholders.

[27] Our license condition ensuring a reasonable opportunity for U.S. involvement was thus not a domestic content requirement. We are unaware of any current U.S. trade policy that imposes such content requirements in favor of the U.S. telecommunications industry.

[28] The Bureau noted that C & W potentially would participate in ownership of the Japanese end of NPC and that PTC, unlike PSI in the Atlantic, was partially owned on the U.S. end by a foreign entity. *Conditional License*, 2 FCC Rcd at 2688, n. 20. Simplex observes that C & W has, in fact, since acquired a 30 percent direct interest in the Western end of the cable. *See, supra*, note 8.

[28] In fact, AT&T argued in Reply Comments in support of its Joint Application to construct the TPC-4 system that "(i)t is not necessarily efficient to make all procurment decisions on the basis of a formal open bidding procedure." *See* File No. I-T-C-89-086, Reply Comments of Joint Applicants, filed on June 1, 1989.

[30] The Submarcom bid, which was also non-compliant, did not receive the continued attention given to Simplex.

[31] NTIA's Comments, which concluded that the Commission should withhold final authorization until a sufficient investigation was conducted, are not to the contrary. NTIA filed its Comments prior to the submission of the bulk of the record here and did not file subsequently.

[32] Simplex had the best opportunity to challenge the clarity and fairness of the Request for Tender during its preliminary review of the document when it and AT&T had unique access to the NPC purchasers. Simplex had a further opportunity to obtain clarity during the bidding process, but apparently did not attempt to exercise this option at that time. We can only rely on the reasonable interpretation of those documents by the author(s), as Simplex must have done during the process.

[33] In the *Conditional License*, PTC had received authorization to locate its landing site in Washington State. We note and approve the relocation to the Alaska and Oregon locations.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 89-524**

In the Matter of

Amendment of Part 80 of the Rules concerning the use of narrow-band direct-printing (NB-DP) frequencies in the Maritime Services — RM-6554

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 2, 1989; Released: November 14, 1989**

By the Commission:

### I. INTRODUCTION

1. This Notice of Proposed Rule Making (NPRM) proposes to amend the Maritime Services Rules (47 C.F.R. Part 80) to require applicants to submit a showing of need to obtain new or additional narrow-band direct-printing (NB-DP) frequencies.[1] Under this proposal, applicants for new or additional NB-DP frequencies would be required to show the schedule of service of each currently licensed or proposed series of NB-DP frequencies and to show a need for additional frequencies based upon at least 40 percent usage of existing NB-DP frequencies. This proceeding was initiated by a Petition for Rule Making, RM No. 6554, filed by Mobile Marine Radio, Inc. (MMR), Public Notice Report No. 1754, released October 19, 1988.

### II. BACKGROUND

2. The Commission first provided for the use of NB-DP techniques in the Maritime Services in Docket No. 20813, 65 FCC 2d 49 (1977). At that time, each licensed public coast station providing a high-seas radiotelegraph service was assigned, by rule, a particular series of NB-DP frequencies. To change frequency assignments required a rule amendment or waiver. By 1983, however, many of the coast stations which were assigned NB-DP frequencies by rule either did not inaugurate radioteleprinter service or had closed. To resolve this problem we initiated PR Docket No. 82-828. In that proceeding, we abolished the method of assigning a particular series of frequencies to a specific public coast station by rule, "pooled" all of the unused frequencies, and made the pooled frequencies available on a first-come, first-served basis to anyone able to use them. *See Licensing and Availability of Narrow-Band Direct-Printing Frequencies*, 54 RR 2d 1202 (1983). To discourage hoarding (warehousing) of these frequencies, we required applicants requesting additional frequencies to make a showing of need based on traffic usage of existing frequencies and to place any authorized frequencies in operation within eight months of the date of grant. When we reorganized Parts 81 and 83 of the rules into Part 80 in PR Docket No. 85-145 in 1986, we removed the NB-DP need showing. *See Reorganization and Revision of Parts 81 and 83 of the Rules to Provide a New Part 80 Governing the Maritime Radio Services*, 52 Fed. Reg. 31206 (Sep. 2, 1986). As a result, there is currently no requirement in the rules that an applicant requesting new or additional NB-DP frequencies make a showing of need.

3. In its petition, MMR requests that we reinstate a need showing for NB-DP frequencies. The showing requested by MMR differs somewhat from that previously required in that it would apply a quantitative factor of 40 percent of the three busiest hours of any four days within a consecutive ten day period in each of the two months immediately prior to the filing of an application as a measure of channel occupancy. MMR points out that the 40 percent standard is currently used for VHF public coast station additional frequency requests. *See* 47 C.F.R. § 80.371(c). MMR states that if such a standard is appropriate to VHF stations, it is *a fortiori* appropriate to HF stations with their much greater communication range. Further, MMR states that without such a standard, additional frequencies have been requested on a very minimal showing. No comments on MMR's petition were received.

### III. DISCUSSION

4. We tentatively conclude that reinstating a need showing for applicants wanting to obtain new or additional NB-DP frequencies would serve the public interest. A need showing is instrumental to our efforts to weed out licensees who do not use their frequencies and to reassign them to those who will. For example, to guard against frequency warehousing, the rules require licensees to place frequencies in operation within eight months of the date of grant. *See* 47 C.F.R. § 80.49. Frequencies not placed in operation are reclaimed and made available for reassignment.[2] Without a corresponding need showing requirement, however, entities that lose frequencies by not placing them in operation can simply reapply for those frequencies, thereby negating the intent of Section 80.49.

5. Public coast stations are common carriers, and therefore, already maintain traffic records for billing purposes. Further, they must file tariffs with the Commission for the communication services provided. Thus, requiring a showing based on the schedule of service and the amount of traffic on existing frequencies should not be an added burden. We propose, therefore, to require applicants requesting NB-DP frequencies to submit a showing of need based on the schedule of service of each currently licensed or proposed series of NB-DP frequencies and, in the case of additional frequencies, a showing of need based upon at least 40 percent usage of existing frequencies. We expressly invite comments, however, on the appropriateness of this standard and on other factors that should be taken into account.

### IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

6. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our initial analysis is as follows:

7. *Reason for Action*. This action is being taken to incorporate into the Commission's Rules a requirement that applicants for narrow-band direct-printing frequencies justify the need for those frequencies.

8. *Objectives*. The proposed action would prevent granting NB-DP frequencies to public coast stations that do not need or will not use them efficiently, thereby keeping them available for public coast stations that will.

9. *Legal Basis*. The proposed action is authorized under Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

10. *Reporting, Recordkeeping and Other Compliance Requirements*. Public coast station applicants will be required to include in their applications for additional frequencies a traffic showing based on records kept for other purposes. *See* paragraph 5 above.

11. *Federal Rules which Overlap, Duplicate, or Conflict with this Rule*. None.

12. *Description, Potential Impact, and Number of Small Entities Involved*. The only impact of this proposal will be on public coast station applicants and licensees. The requirement will be a small incremental addition to the application. There are currently fewer than ten licensees providing NB-DP services. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on a small number of licensees. The information that must be submitted is similar to a prior requirement and based on records kept for other purposes. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

13. *Any Significant Alternatives Minimizing the Impact on Small Entities and Existing Licensees and Consistent with the Stated Objective*. None.

## V. PROCEDURAL MATTERS

14. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter: (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolutions of issues in the proceeding. *See* 47 C.F.R. § 1.1203. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on a small number of licensees. The information that must be submitted is similar to a prior requirement and based on records kept for other purposes. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

15. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

16. Authority for issuance of this Notice is contained in Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§ 1.415 and 1.419) interested parties may file comments on or before **January 4, 1990,** and reply comments on or before **January 19, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C.

17. A copy of this NPRM shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.**

2. In Section 80.361, the introductory sentence preceding the table in paragraph (a) is revised to read as follows:

**§ 80.361 frequencies for narrow-band direct-printing (NB-DP) and data transmissions.**

(a) The following table describes the frequency pairs and Channel Series which are assignable to ship and public coast stations for narrow-band direct-printing (NB-DP) and data transmissions. NB-DP frequencies will be assigned to public coast station applicants for new and additional frequencies that make a substantial showing of need based on the following factors:

(1) The schedule of service of each currently licensed or proposed series of frequencies;

(2) For additional frequency assignments, a factual showing that for the three busiest hours of any four days within a consecutive ten day period in each of the two months immediately prior to the filing of the application that the applicant has used its currently assigned frequency or frequencies in the same MHz order an aggregate average of at least 40% of the three busiest hours of each day for exchanging communications; and

(3) Any other facts supporting the need for the proposed service.

**Paired channels:**

* * * * *

**FOOTNOTES**

[1] Public coast station NB-DP operations provide world-wide, high-seas radioteletype service between ships and points on land.

[2] *See*, for example, Public Notice issued Jauary 19, 1988, DA 87-1788.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-42**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5646 |
| Table of Allotments, | RM-5882 |
| FM Broadcast Stations. | RM-5883 |
| (Rockport, Gregory, Alice and Armstrong, Texas)[1] | RM-5884 |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 19, 1989; Released: November 14, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 52 FR 7625, March 12, 1987, issued at the request of Aransas County Broadcasting ("Aransas"), proposing the substitution of Channel 275C2 for Channel 272A at Rockport, Texas, and the modification of the permit[2] for Station KPCB(FM) to specify operation on Channel 275C2. In response to the *Notice*, Aransas filed supporting comments restating its interest in the proposal. Gregory Broadcasting ("GB"), Texas Media Group, Inc. ("Texas Media"), [3] the licensee of Station KZFM(FM), Corpus Christi, Texas, and Edgar L. Clinton ("Clinton"),[4] the licensee of Station KSOX(FM), Raymondville, Texas, filed comments and counterproposals suggesting that Channel 275C2 be allotted to Gregory, Texas, (RM-5882), Armstrong, Texas (RM-5884) or Alice, Texas (RM-5883), respectively.[5] Sandlin Broadcasting Company, Inc. ("Sandlin"), the licensee of Station KMKS-FM at Bay City, Texas, also filed comments in support of the Rockport proposal. Aransas, Texas Media, Clinton, GB and Alice Broadcasting Corporation, licensee of Station KBIC(FM) at Alice, Texas, filed reply comments.[6]

2. After further review of the counterproposal filed by GB we find that it is defective and unacceptable for consideration. GB requests the allotment of Channel 275C2 to Gregory, Texas, as that community's first local FM service.[7] However, GB failed to include with its counterproposal a technical study for Channel 275C2 demonstrating the channel's compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Consequently, the proposal warrants no further discussion and will be dismissed accordingly.

3. We have also determined that the counterproposal advanced by Clinton, which suggests the allotment of Channel 275C2 as a substitute for Channel 272A at Alice, Texas, and the modification of the license for Station KBIC(FM) to specify operation on Channel 275C2, is unacceptable (RM-5883). The proposal was procedurally defective since Clinton failed to state his intention to apply for the channel or to obtain such an expression from the licensee of Station KBIC(FM). Clinton also urges the Commission to consolidate the instant proceeding with a separate proceeding involving Raymondville and Alice, Texas, MM Docket No. 87-88, in which Channel 271C2 has been proposed as a substitute channel at Alice. As a result of the defective counterproposal we are denying the request for consolidation. However, we shall consider Clinton's filing as comments.

4. In its comments, Clinton suggests the substitution of Channel 272C2, rather than Channel 275C2, for Channel 272A at Rockport. Clinton asserts that this can be accomplished if Channel 275C2, rather than Channel 271C2, is substituted for Channel 272A at Alice. In addition, Clinton states the allotment of Channel 272C2 will have to be at "a special reference point amongst tall towers southwest of Rockport." Clinton contends that if the above-mentioned changes are permitted the communities of Rockport, Alice and Raymondville may receive their first wide-coverage area FM service.

5. In its comments, Texas Media expresses an interest in applying for Channel 275C2 at Armstrong, Texas, and providing a first local service to the area. Texas Media states that the allotment to Armstrong will result in service to transportation routes in South Texas. It claims that the proposal would "permit the provision of first aural service to over 30 kilometers of U.S. Route 77, over 50 kilometers of the intracoastal waterway along the southeast Texas coast, and over 40 kilometers of U.S. Route 281." Texas Media contends that Armstrong located in the center of Kenedy County is an "independent community," with a population of less than 500 and has its own zip code (78338). Texas Media urges the denial of the Rockport proposal in favor of the Armstrong proposal.

6. Aransas, in its reply comments, objects to Clinton's suggestion that Channel 272C2 be used to accomplish the Rockport upgrade. Aransas alleges that the proposal would require Station KPCB(FM) to relocate its transmitter site to an area that "is either in the waters of Aransas Bay or the wet lands estuary." Aransas claims that both areas are "environmentally-sensitive" as they are "under the jurisdiction of the U.S. Corps of Engineers and the State of Texas." Aransas also objects to the transmitter site relocation since it would be forced to incur an insurmountable expense to accomplish and maintain the facilities. It asserts that at KPCB's existing transmitter site the upgrade can be accomplished in "an expeditious manner, and in an efficient and economical fashion." Aransas urges the Commission to deny consideration of Clinton's alternative channel at Rockport which "places Aransas in circumstances where it would have serious, if not impossible, hurdles to overcome."

7. Aransas raises issues as to the community status of Armstrong for allotment purposes. Aransas states that Armstrong lacks the necessary indicia of a community, such as population, post office, school or business. Aransas points to the fact that Armstrong is neither listed in the U.S. Census, nor is it an incorporated community. Aransas also argues that Texas Media's proposal to allot the channel to Armstrong may violate the Commission's duopoly rules since the Armstrong station's 1 mV/m contour would necessarily overlap with the 1 mV/m contour of Station KZFM(FM), Corpus Christi. Clinton also disputes Armstrong's community status. Clinton states that the zip code which Texas Media claims is for Armstrong is actually for the Kingsville area. It contends that the

population figure of slightly less than 500 provided by Texas Media for Armstrong is questionable, considering the fact that Kenedy County has a population of 543. GB also objects to the Armstrong proposal.

## DISCUSSION

8. We must first address the issues raised concerning the community status of Armstrong. Armstrong is not listed in the U.S. Census nor is it incorporated. Therefore, Texas Media was required to provide sufficient information to demonstrate that such a place has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. *See e. g., Cascade Village, Colorado*, 48 FR 19917, May 3, 1983; and *Ellwood, California*, 50 FR 13031, April 2, 1985. The fact that Armstrong has its own post office,[8] standing alone is insufficient to demonstrate community status. Texas Media failed to demonstrate whether Armstrong has any businesses, social organizations or governmental units that identify themselves with the area. The population for the area identified as Armstrong appears to be 120 persons. Although our engineering analysis reveals there is another channel[9] available for allotment to Armstrong to remove the conflict with the Rockport proposal, we find that Texas Media has failed to provide sufficient information to demonstrate that Armstrong qualifies as a "community" for allotment purposes. Therefore, on the basis of the information before us, we will not allot a channel to Armstrong. *See Penacook, New Hampshire*, 52 FR 3765, February 5, 1987.

9. In response to the arguments raised by Clinton, we conclude that it is necessary to consider the allotment of Channel 272C2 at Rockport in lieu of Channel 275C2 as proposed. Consideration of Channel 272C2 at Rockport will remove a conflict with a separate proceeding, MM Docket No. 87-88.[10] After careful consideration of all the information presented in this proceeding, we believe that the public interest would be served by substituting Channel 272C2 for Channel 272A at Rockport. Our engineering analysis reveals that Channel 272C2 can be allotted to Rockport in compliance with the minimum separation requirements of Section 73.207 Commission's Rules with a site restriction. A site restriction of at least 19.9 kilometers (12.4 miles) southeast of Rockport is required in order to meet the spacing requirements to Station KYOC(FM), Channel 272A, Yoakum, Texas, and Station KMKS(FM), Channel 273C2, Bay City, Texas. We find that this restricted site, at coordinates 27-52-45 and 96-56-16, is located in the water. However, we have confirmed that a site 26.6 kilometers (16.5 miles) southwest of Rockport is available on dry land that meets the spacing requirements.[11] In addition, Station KBIC(FM) at Alice must vacate Channel 272A and be licensed in accordance with the Commission's recent action upgrading that facilities before the Rockport upgrade can be effectuated.

10. Our engineering analysis determined that the site specified above is located on dry land in an area among other radio towers. Aransas will be required to relocate its present transmitter site in order to accomplish the upgrade. Generally, we refrain from requiring a transmitter site change by an unwilling licensee or permittee. However, we do not believe that a licensee or permittee that voluntarily invokes the Commission's processes in order to obtain higher class facilities may invoke our policy against involuntary transmitter site moves if the transmitter site move is needed to accommodate its request for an upgrade and a number of otherwise mutually exclusive requests for upgrades. We find no valid argument against the allotment of Channel 272C2 at Rockport. We believe such action is in the public interest and will result in the best overall arrangement of FM allotments. Furthermore, if Aransas does not wish to utilize the channel, the Commission will entertain a proposal to retain the existing Class A channel at Rockport.

11. The allotment of Channel 272C2 at Rockport must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Kingsville, Texas. Since the community is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence from the Mexican government has been obtained.

12. In accordance with Section 1.420(g) of the Commission's Rules we are modifying the license of Station KPCB(FM) to specify operation on Channel 272C2 in lieu of Channel 272A.

13. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 29, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Rockport, Texas | 272C2 |

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Aransas County Broadcasting for Station KPCB(FM), at Rockport, Texas, IS MODIFIED, to specify operation on Channel 272C2 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the petition of Gregory Broadcasting requesting the allotment of Channel 275C2 to Gregory, Texas (RM-5882), IS DISMISSED.

16. IT IS FURTHER ORDERED, That the petition of Edgar L. Clinton requesting the allotment of Channel 275C2 to Alice, Texas (RM-5883), IS DISMISSED.

17. IT IS FURTHER ORDERED, That the petition of Texas Media Group, Inc., requesting the allotment of Channel 275C2 to Armstrong, Texas (RM-5884), IS DENIED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## FOOTNOTES

[1] The communities of Gregory, Alice and Armstrong, Texas, have been added to the caption.

[2] A license for the construction permit was granted April 21, 1988.

[3] Texas Media submitted late-filed comments. In reviewing the comments, we find that Texas Media has presented no additional information to aid us in reaching our decision. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, the late-filed comments will not be accepted for consideration.

[4] Clinton is simultaneously involved in a separate proceeding proposing the substitution of Channel 271C2 for either Channel 269A at Raymondville, Texas, or Channel 272A at Alice, Texas. *See* MM Docket No. 87-88, 52 FR 13851, April 27, 1987.

[5] Public Notice of the counterproposals was given on May 1, 1987, Report No. 1657.

[6] Clinton subsequently filed a petition for leave to file "Supplemental Comments," in response to the Aransas's reply comments. Texas Media filed a late letter retransmitting a letter from W. J. Tiller. In accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the late filings.

[7] Channel 283A (vacant and applied for) has in a separate proceeding, been allotted to Gregory, Texas, effective September 26, 1988. *See* 53 FR 33492, August 31, 1988. Therefore, Channel 275C2 would represent a second local FM service to Gregory.

[8] In the late-filed comments Texas Media asserts that there is also a Justice of the Peace assigned to Armstrong.

[9] Channel 264C2.

[10] In that proceeding which involves proposals for Raymondville and Alice, Texas, we have substituted Channel 275C2 for Channel 272A at Alice, Channel 271C2 for Channel 269A at Raymondville, and modified of the licenses of Station KBIC(FM) and Station KSOX(FM) to specify operation of on the higher class channels accordingly. The two upgrades were accomplished in addition to the allotment of a second local FM service to Falfurrias, Texas. *See Report and Order,* in MM Docket No. 87-88.

[11] The restricted site coordinates are 27-49-30 and 97-12-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-88**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-5523 |
| Table of Allotments, | RM-5578 |
| FM Broadcast Stations. | RM-5947 |
| (Raymondville, Alice and Falfurrias, Texas)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 19, 1989; Released: November 14, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 52 FR 13851, April 27, 1987, proposing the substitution of Channel 271C2 for either Channel 269A at Raymondville, Texas, or for Channel 272A at Alice, Texas. The *Notice* was issued in response to mutually exclusive petitions filed by Edgar L. Clinton ("Clinton"), licensee of Station KSOX-FM, Channel 269A, Raymondville, and Alice Broadcasting Corporation ("Alice Broadcasting"), licensee of Station KBIC(FM), Channel 272A at Alice. The *Notice* also proposed the modification of their licenses to specify operation on the higher class channel. Clinton and Alice Broadcasting filed comments reiterating their interest in upgrading their facilities.[2] Falfurrias Broadcasting Enterprises ("FBE") filed a counterproposal and expressed an interest in the allotment of Channel 271A at Falfurrias, Texas, as that community's second local FM service.[3] Texas Media Group, Inc. ("Texas Media"), filed comments.[4] Clinton and Alice Broadcasting filed reply comments. Cynthia Alderete Earle d/b/a Alderete Communications submitted late-filed comments.[5]

2. Clinton, in his comments, urges the Commission to consolidate the instant proceeding with a separate proceeding involving Rockport, Texas, MM Docket No. 87-42, so that the desires of all parties seeking an upgrade may be accommodated. Clinton claims that Channel 271C2 at Raymondville provides the only opportunity for Station KSOX-FM to become a wide-coverage area facility. In order to permit the use of Channel 271C2 at Raymondville Clinton suggests the allotment of Channel 275C2 to Alice.[6] Clinton contends that his alternative proposal will better serve the public interest by granting Raymondville and Alice an opportunity to receive improved FM coverage. In reply comments, Clinton addresses the counterproposal for Falfurrias by suggesting several alternative channels (264A, 277A, 283A or 298A) for use at that community.

3. Texas Media urges the Commission to "accord decisional significance" to the need for service at Armstrong when resolving the conflict between the Raymondville and Alice proposals.

**DISCUSSION**

4. We shall deny Clinton's request for consolidation of the instant proceeding and MM Docket No. 87-42. Although the two proceedings are interrelated, we do not find it necessary to consolidate the two separate proceedings to consider an alternative channel at Alice. In response to the concerns raised by Texas Media, we have considered an alternative channel for Rockport in MM Docket No. 87-42.

5. We have confirmed that there are other channels available for allotment at Falfurrias thereby removing the conflict between Channel 271A at Falfurrias and the proposals in the *Notice*. Channel 277A can be allotted to Falfurrias, as that community's second local FM service, in compliance with the Commission's minimum distance separation requirements.[7]

6. Based on our engineering analysis we have determined that there are no channels other than 271C2 usable at Raymondville. However, we have confirmed that Channel 275C2 can be allotted to Alice. Therefore, Channel 271C2 can be allotted to Raymondville without the need for comparison between the two proposals. After considering all the information before us, we conclude that the public interest would be served by substituting Channel 271C2 for Channel 269A at Raymondville, Texas, and substituting Channel 275C2 for Channel 272A at Alice, Texas. In view of the aforementioned, two communities, Raymondville and Alice, could receive a first wide-coverage area FM service, as well as the provision for a second local FM service at Falfurrias.

7. Channel 271C2 can be substituted for Channel 269A at Raymondville in compliance with Section 73.207 of the Commission's Rules with a site restriction. A site restriction of 17.3 kilometers (10.8 miles) north of the community is required in order to avoid a short spacing to Channel 270A at Valle Hermosa, Mexico.[8]

8. Channel 275C2 can be allotted to Alice as a substitute for Channel 272A in compliance with the Commission's minimum spacing requirements at the present site of Station KBIC(FM).[9] In addition, that allotment must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Kingsville, Texas.

9. Since Alice, Falfurrias and Raymondville are located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence from the Mexican government has been obtained.

10. In accordance with Section 1.420(g) of the Commission's Rules we are modifying the licenses of Station KSOX-FM and Station KBIC(FM) to specify operation on Channel 271C2 (in lieu of Channel 269A) and Channel 275C2 (in lieu of Channel 272A), respectively.

11. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 29, 1989,** the FM

Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

| City | Channel No. |
|---|---|
| Alice, Texas | 221A, 275C2 |
| Falfurrias, Texas | 277A, 292A |
| Raymondville, Texas | 271C2, 289A |

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Edgar L. Clinton for Station KSOX-FM, at Raymondville, Texas, IS MODIFIED, to specify operation on Channel 271C2 in lieu of Channel 269A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Alice Broadcasting Corporation for Station KBIC(FM) at Alice, Texas, IS MODIFIED, to specify operation on Channel 275C2 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. The window period for filing applications on Channel 277A at Falfurrias, Texas, will open on **January 2, 1990,** and close on **February 1, 1990.**

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The community of Falfurrias, Texas, has been added to the caption.

[2] Clinton also filed an errata to his comments.

[3] Public Notice of the counterproposal was given on June 23, 1987, Report No. 1665.

[4] In a separate proceeding, Texas Media has requested the allotment of Channel 275C2 to Armstrong, Texas. *See* MM Docket No. 87-42, 52 FR 7625, March 12, 1987. Texas Media also transmitted a copy of a letter from W. J. Tiller.

[5] In accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the late-filed comments.

[6] Clinton also suggests that consideration be given to the allotment of Channel 272C2 at Rockport in lieu of Channel 275C2, as proposed in the Rockport proceeding.

[7] The reference coordinates are 27-13-30 and 98-08-36.

[8] The restricted site coordinates are 26-38-00 and 97-45-00.

[9] The coordinates are 27-46-35 and 98-04-41.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-484**

In the Matter of

Amendment of Section 73.202(b), RM-6972
Table of Allotments,
FM Broadcast Stations.
(Edinboro, Pennsylvania)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 19, 1989; Released: November 14, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Wincapp Broadcasting, Inc. (petitioner), requesting the substitution of Channel 250B1 for Channel 250A at Edinboro, Pennsylvania, and the modification of its license for Station WMYJ accordingly. Petitioner states that it will apply for the channel, if allotted.

2. Channel 250B1 can be allotted to Edinboro in compliance with the Commission's minimum distance separation requirements with the exception of a 5.2 kilometer short-spacing to Station CHTZ-FM, Channel 249B, St. Catharines, Ontario, Canada, and can be used at the station's present transmitter site.[1] Since the area between the two commmunities is comprised almost entirely of Lake Erie, and thus any interference would occur over water, we will request concurrence by the Canadian government as a specially negotiated allotment. Canadian concurence is required since Edinboro is located within 320 kilometers of the U.S.-Canadian border. As requested, we also propose to modify petitioner's license for Station WMYJ to specify operation on Channel 250B1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 250B1 at Edinboro or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 250B1 for Channel 250A at Edinboro, Pennsylvania, since it could enable Station WMYJ to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Edinboro, Pennsylvania | 250A | 250B1 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 5, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Sidney White Rhyne, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons & Topel, P.C.
1000 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-57-59 and West Longitude 80-06-40.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-491**

In the Matter of

Amendment of Section 73.202(b), RM-6945
Table of Allotments,
FM Broadcast Stations.
(Brantley, Alabama)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 19, 1989; Released: November 14, 1989**

By the Chief, Allocations Branch:

1. A petition for rule making has been filed on behalf of Crenshaw Broadcasting Company (petitioner) requesting the allotment of Channel 262A to Brantley, Alabama, as that community's second local FM broadcast service.[1] Petitioner states that if the proposal is granted, it, or an entity of which it is a part, will apply for the channel.

2. We have determined that Channel 262A can be allotted to Brantley, Alabama, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter is sited at least 4.0 kilometers (2.5 miles) northwest of the community[2] to avoid short-spacing to Channel 263A at Fort Rucker, Alabama. [3]

3. In view of the fact that Brantley could receive a second local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Brantley, Alabama | 282A | 262A,282A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 5, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Crenshaw Broadcasting Company
Attn: Steven D. Lester
627 Edgewood Acres
Luverne, Alabama 36049

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] A proposal has been filed by Brantley Broadcast Associates, permittee of Channel 282A, Brantley, Alabama (BPH-880224MR), in MM Docket No. 88-593, seeking to change its community of license from Brantley to Luverne, Alabama, and to modify its facilities to specify operation on Channel 282C1.

[2] Coordinates used in this determination are 31-36-00 and 86-17-44. This site also affords protection to two applications at Fort Rucker (BPH-880407MJ and BPH-880407NA).

[3] Channel 263A has been proposed as a substitute for Channel 226A at Fort Rucker, Alabama, in MM Docket No. 87-618, for which the comment period is cut off.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-397**

In the Matter of

Amendment of Section 73.202(b), RM-6326
Table of Allotments,
FM Broadcast Stations.
(Essex, California)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 19, 1989; Released: November 14, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5403 (1988), proposing the allotment of Channel 255B to Essex, California, as that community's first local broadcast service. Howard B. Anderson, the petitioner for the allotment of Channel 255B, filed comments and stated an intention to apply for the channel, if allotted.

2. Since Essex, California, is located within 320 kilometers (199 miles) of the US-Mexico border, the Commission obtained concurrence of the Mexican Government in the proposal.

3. A staff engineering analysis indicates that Channel 255B can be allotted to Essex, California, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules,[1] provided the transmitter is located at least 3.1 kilometers (1.9 miles) north of the community to avoid short-spacing to Channel 255B, Cuervos, Baja, Mexico.[2]

4. The *Notice* requested the petitioner to provide sufficient information to demonstrate that Essex has social, economic or cultural indicia to qualify it as a "community" for allotment purposes since it is not listed in the U.S. Census. In support of its proposal, petitioner states that Essex is a community with civic, charitable, religious, educational, and social institutions, municipal services, and a post office to serve its residents. The community of Essex operates the Essex School for children in grades kindergarten through eighth. There is a parent-teacher organization at the school. Also, there is a social square dance club that holds dances every Saturday night at the school. There is a Cub Scout Pack and a Girl Scout Troop in Essex. The First Baptist Church is located in the community. In addition, Essex has a post office with its own zip code of 92332, and is listed in the telephone directory under the "Upper Mojave". The community receives its electric service from Southern California Edison. Essex is listed in the Rand McNally Commercial Atlas with a population of 75 persons.

5. The *Notice* also requested the petitioner to clarify whether he intends to discharge his primary service obligation. In comments, the petitioner stated an intention to discharge his primary service obligation in order to serve the needs and interests of the community of Essex, and, in addition, to serve the large mobile population travelling daily along Interstate 40.

6. Given its small size, it is not surprising that the list of social and cultural institutions in Essex is relatively small. Indeed, considering the population of Essex and in the surrounding areas, it appears to be a fairly vibrant community. [3] Congressional intent in enacting Section 307(b) of the Communications Act in its present form was to provide the Commission with greater discretion in distributing frequencies, and to remove uniform but somewhat artificial barriers to the initiation of service in sparsely populated areas.[4] Given the circumstances discussed above, were we to deny Essex community status we would frustrate Congressional intent.

7. Based on the information submitted by the petitioner, we believe it is sufficient to establish that Essex qualifies as a community for allotment purposes. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 29, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Essex, California | 255B |

8. The window period for filing applications for Channel 255B at Essex, California will open on **January 2, 1990,** and close on **February 1, 1990.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Ordee Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] Coordinates for Channel 255B at Essex are 34-45-51 and 115-15-07.

[2] Reference coordinates of Channel 255B at Cuervos are 32-37-35 and 114-51-03.

[3] We take official notice of the fact the areas surrounding Essex are sparsely populated.

[4] *See, e.g.,* H.R. Rep. No. 2589, 74th Cong., 2nd Sess. 3 (1936).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-492**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6900 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Detroit Lakes, Minnesota) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 23, 1989; Released: November 14, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Robert D. Spilman (petitioner), seeking the allotment of FM Channel 272C2 to Detroit Lakes, Minnesota, as that community's second FM Broadcast service. Petitioner provided an engineering study in support of the petition and indicated he would apply for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 272C2 can be allotted to Detroit Lakes, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 3.6 kilometers (2.3 miles) north of the community.[1] The site restriction will prevent a conflict with a construction permit for Channel 273C, Station KQIC, Wilmar, Minnesota. Since Detroit Lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained.

3. In view of the fact that the proposed allotment could provide a second FM broadcast service to Detroit Lakes, Minnesota, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Detroit Lakes, Minnesota | 236C1 | 236C1, 272C2 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 5, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eugene T. Smith
715 G Street, S.E.
Washington, D.C. 20003
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

### APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for Channel 272C2 are 46-50-48 and 95-50-05.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Petition for Reconsideration
of the Denial of a Petition to Deny
the Applications of

PANHANDLE EASTERN PIPE LINE COMPANY
for MAS Frequencies

File Nos. 741253-741266
MPD-2677

Petition for Reconsideration

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 7, 1989; Released: November 14, 1989**

By the Chief, Private Radio Bureau:

## I. INTRODUCTION

1. The Utilities Telecommunications Council (UTC)[1] seeks reconsideration of a Private Radio Bureau (Bureau) determination that Panhandle Eastern Pipe Line Company (Panhandle) is eligible for licensing on Power Radio Service multiple address frequencies. For the reasons set forth below, we deny UTC's petition.

## II. BACKGROUND

2. On April 6, 1988, Panhandle applied for 14 Power MAS frequency pairs. These applications were placed on Public Notice on April 22, 1988.[2] Panhandle stated as a basis for its eligibility to use these frequencies that it distributes natural gas to members of the general public and a cooperative. UTC, however, filed a pre-grant Petition to Deny on May 23, 1988, alleging that Panhandle is not eligible for licensing on Power Radio Service frequencies because, contrary to the Commission's Power Radio Service eligibility criteria, Panhandle engages only in the long-haul transmission of natural gas. Panhandle filed an Opposition on June 6, 1988. Panhandle acknowledged that it is engaged in the long-haul transmission of natural gas, but stated that it distributes natural gas to members of the general public and to a cooperative involved in the distribution of natural gas to end customers. UTC filed a Reply on June 15, 1988. UTC again asserted that Panhandle is not eligible in the Power Radio Service because it is primarily engaged in the transmission of natural gas and not in distribution of natural gas to the general public or members of a cooperative as required by the Commission's Power Radio Service eligibility criteria.

3. By *Order* dated July 15, 1988, the Bureau denied UTC's petition. The Order found that UTC's objections were insufficient to warrant denial of Panhandle's applications because the distribution functions performed by the applicant satisfied the eligibility criteria for Power Radio Service licensing. On August 4, 1988, UTC filed the instant petition for reconsideration (UTC Petition). Panhandle filed an Opposition on August 16, 1988, and UTC filed a Reply on August 24, 1988.[3]

## III. THE PLEADINGS

4. UTC asserts that Panhandle is not eligible to be licensed for Power MAS frequencies because it is not primarily engaged in the business of distributing natural gas to the general public or members of a cooperative.[4] UTC asserts that, with transmission facilities covering over one-third of the continental United States, Panhandle is engaged primarily in the business of long-haul transmission of natural gas, contrary to the criteria of Section 90.63(a)(2) of the Commission's Rules, 47 C.F.R. § 90.63(a)(2).[5] UTC argues that Panhandle is not eligible to operate on the exclusive Power MAS frequencies because Panhandle is not, by these activities, a Power Radio Service eligible. UTC acknowledges that Panhandle sells natural gas to specific end users near its transmission pipeline. UTC argues, however, that Panhandle is not primarily engaged in any distribution functions to the general public or to members of a cooperative organization. Finally, UTC argues that granting Panhandle's applications would effectively render the Commission's decision to retain the Power MAS Pool until January 1, 1992, meaningless by allowing entities not eligible in the Power Radio Service to usurp these frequencies.

5. Panhandle, in Opposition, challenges UTC's standing to bring the instant petition. Panhandle argues that UTC lacks standing because it has not alleged an injury that would make out a justiciable claim.[6] Alternatively, Panhandle argues that the Bureau correctly and reasonably determined that Panhandle's applications should be granted. Panhandle states that it is engaged in the distribution of gas by pipeline to members of the general public in a substantial way. Panhandle notes that it distributes gas to such members of the public as irrigation farmers, farm tap users, General Motors Corporation, glass manufacturers, hospitals and others, as well as to members of Missouri Farmers Association, a cooperative involved in the distribution of natural gas.[7]

6. Panhandle also notes that it is already licensed by the Commission to operate 34 Power MAS stations and that the referenced applications merely proposed additions to its existing system, which has not been challenged until this proceeding. Panhandle states that its Power MAS system promotes the efficient distribution of natural gas, helping ensure that an adequate gas supply is made available to the public. Panhandle argues that, as such, authorization of its Power MAS system is in the public interest and consistent with the Commission's objectives in authorizing radio systems in the MAS Power Radio Service.[8] In summary, Panhandle submits that although it is also engaged in other business activities, it is engaged in the distribution of natural gas in a substantial way, sufficient to establish eligibility in the Power MAS Radio Service.[9]

7. In Reply, UTC argues that it has standing to bring the instant petition because a trade association has standing to act on behalf of its members where the association alleges, as UTC has, that its members are suffering an immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case if the members themselves had brought the suit.[10]

Finally, UTC argues again that Panhandle is not eligible for licensing in the Power Radio Service because it is not primarily engaged in the eligibility conferring activities.[11]

## IV. DISCUSSION

8. The first issue presented is whether UTC has standing to bring the instant petition. UTC, a trade association with over 2000 members, is the national representative on telecommunications matters for member electric, gas, water and steam utilities, on whose behalf it filed the instant petition.[12] UTC also provides engineering studies for the use of Power MAS frequencies, as do other entities.[13]

9. Generally speaking, a trade association has standing to act on behalf of its members where the association alleges that its members are suffering an immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case if the members themselves had brought the suit.[14] The objection presented by UTC alleges the type of threatened injury required to confer standing because most, if not all, of UTC members would have standing individually to object to any Commission action perceived as a premature abolishment of the exclusive Power MAS pool. We find, therefore, that UTC has standing to request reconsideration of the July 15, 1988 *Order* denying its Petition to Deny.

10. Turning to the merits of UTC's assertion that Panhandle is not eligible for licensing on Part 94 MAS Power frequencies, eligibility for licensing on frequencies governed by Part 94 is set forth in Section 94.5 of the Commission's Rules.[15] Section 94.5 provides that persons eligible for licensing under Parts 80, 87 or 90 of the Commission's Rules, 47 C.F.R. Parts 80, 87 and 90, may be licensed for Part 94 frequencies for use in private operational-fixed communications related to the activities for which the person is eligible under those Rule Parts. In this case, Panhandle states that it is eligible for MAS frequencies as a Part 90 Power Radio Service eligible, as set forth in Section 90.63(a)(2) of the Commission's Rules, 47 C.F.R. § 90.63(a)(2).

11. Section 90.63(a)(2) states that an applicant is eligible in the Power Radio Service if it is primarily engaged in "the distribution of manufactured or natural gas by means of pipeline, for use by the general public or by the members of a cooperative organization, or, in combination of that activity with the production, transmission or storage of manufactured or natural gas preparatory to such distribution." As previously discussed, UTC argues that Panhandle is not eligible in the Power Radio Service because it is not "primarily engaged" in the distribution of natural gas to the public or to members of a cooperative. In other words, UTC argues that Panhandle is not eligible because its chief or principal business is not distribution of natural gas.

12. The record indicates that Panhandle is eligible to be licensed for the 14 Power MAS frequency pairs at issue here and that UTC's petition should be denied. The public policy purpose of Section 90.63(a)(2) is to differentiate between a *de minimis* or marginal business activity, engaged in merely to secure eligibility, and an activity that constitutes a regular or integral part of the applicant's business. The record indicates that Panhandle is engaged in a substantial, *bona fide*, way in the distribution of natural gas for use by the general public and to cooperative organizations along with its gas transmission operations. UTC has offered no evidence that Panhandle undertook these distribution activities merely as a pretext to circumvent the eligibility rules. Indeed, on the facts in this record, it would be difficult for the Bureau to conclude that one of Panhandle's regular business activities is not the distribution of natural gas to the public and others as contemplated by Section 90.63(a)(2).[16] We conclude, therefore, that Panhandle is "primarily engaged" in the distribution of natural gas as contemplated by Section 90.63(a)(2)[17] and is therefore eligible to be licensed on the Power MAS frequencies.[18]

## V. CONCLUSION

13. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the Utilities Communications Counsel, File No. M-2677 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

## FOOTNOTES

[1] UTC states that it is a trade association with over 2000 electric, gas, water and steam utility members, which it represents on telecommunications matters at the national level.

[2] Public Notice Report No. 1427, April 22, 1988.

[3] The Bureau granted 13 of the referenced applications on November 7, 1988, conditioned on the outcome of the instant proceeding. The Bureau conditionally granted the fourteenth application, file number 741253, on November 17, 1988, after the applicant corrected a minor technical error and resubmitted the application.

[4] UTC Petition at 7-9. UTC also asserts that Panhandle is not using its MAS facilities in combination with the distribution activity set forth by Section 90.63(a)(2), for the production, transmission or storage of manufactured or natural gas preparatory to such distribution. UTC Petition at 7.

[5] UTC Petition at 4.

[6] Opposition to Petition for Reconsideration at 2-3.

[7] *See* Opposition to Petition for Reconsideration at 5-6; Statement of F. R. Krentzel, Staff Engineer, Panhandle Eastern Pipeline Line Company, dated May 26, 1988 (hereinafter referred to as "Statement of F. R. Krentzel"), incorporated to Panhandle's Opposition to Petition to Deny; Opposition to Petition to Deny at 4-6.

[8] Opposition to Petition for Reconsideration at 5. Panhandle also states that it currently delivers gas measurement data acquired through its authorized system to other gas utilities, some of whom are UTC members, free of charge. *See* Statement of F. R. Krentzel at 1.

[9] Opposition to Petition for Reconsideration at 6.

[10] Reply to Opposition to Petition for Reconsideration at 2-3.

[11] The following post-grant pleadings are also before the Bureau: UTC's February 21, 1989 Supplement, Panhandle's February 24, 1989 Motion to Strike Unauthorized Pleading, UTC's March 10, 1989 Opposition, and Panhandle's March 14, 1989 Reply. We have elected to review substantively each of these

pleadings, pursuant to Section 1.45(c), 47 C.F.R. § 1.45(c), in the interest of developing as complete a record as possible in this proceeding.

[12] UTC Petition at 2.

[13] The Commission has not certified exclusive coordinators for MAS frequencies in the private operational fixed service. UTC is a nonexclusive frequency coordinator for MAS Power Radio Service frequencies. It is also the Commission's certified frequency coordinator for the land mobile Power Radio Service. *See* PR Docket 87-737, 103 FCC 2d 1093 (1986). UTC has participated extensively, on behalf of its members, in Commission proceedings concerning the allocation of MAS Power Radio Service frequencies.

[14] *See* Warth v. Seldin, 422 U.S. 490, 511 (1975), Office of Communication of the United Church of Christ, 359 F.2d 999 (D.C. Cir. 1966).

[15] 47 C.F.R. § 94.5.

[16] Moreover, where local distribution and cross-country natural gas transmissions are combined as part of a single integrated operation, the utility provider is eligible for frequencies in the Power Radio Service. *See* Memorandum Opinion and Order, 42 FCC 434 (1954).

[17] The term "primarily engaged" must be given a definition that is both sensible and in harmony with the public policy purpose of Section 90.63(a)(2). *See e.g.*, Securities Industry Association v. Board of Governors of the Federal Reserve System, 839 F.2d 47, 65 (2nd Cir. 1988).

[18] Of course, these Power MAS frequencies may be used by Panhandle only for communications relating to the distribution of natural gas for use by the general public or members of cooperative organizations, or for production, transmission or storage operations preparatory to such distribution. These frequencies are not available for communications supporting Panhandle's long-haul gas transmission business. In other words, the 14 Power MAS frequency pairs are available only for communications in support of the gas distribution activities that form the basis for Panhandle's eligibility in the MAS Power Radio Service.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**SOUTHERN NEW ENGLAND TELEPHONE COMPANY, PUERTO RICO TELEPHONE COMPANY AND CINCINNATI BELL TELEPHONE COMPANY FILE REVISIONS TO THEIR COST ALLOCATION MANUALS**

**PUBLIC COMMENT INVITED**

**Released: November 14, 1989**

On October 26, 1989, the Southern New England Telephone Company and the Puerto Rico Telephone Company filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs. On October 31, 1989, Cincinnati Bell Telephone Company filed revisions to its cost allocation manual. These LECs filed their original manuals in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manuals no later than **December 11, 1989.** Replies should be filed by **December 27, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812, Washington, D. C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N. W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D. C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

BLACK TELEVISION WORKSHOP OF
LOS ANGELES, INC.
(Assignor)

HISPANIC CHRISTIAN
COMMUNICATIONS NETWORK
(Assignee)

For Assignment of Construction Permit
for Station KEEF-TV, Los Angeles, California

## MEMORANDUM OPINION AND ORDER

**Adopted: November 8, 1989; Released: November 14, 1989**

1. The Chief, Mass Media Bureau, has for consideration: (a) a petition for reconsideration of the Bureau's dismissal of a distress sale application filed, pursuant to Section 1.106(a) of the Commission's Rules, by Black Television Workshop of Los Angeles, Inc. (BTW) and Hispanic Christian Communications Network (HCCN), on May 15, 1989; (b) a related and contemporaneously filed "Emergency Petition for Special Relief,"[1] which seeks the assignment of Station KEEF-TV, Los Angeles, California, from BTW to HCCN, pursuant to the Commission's minority distress sale policy;[2] (c) a concurrently refiled application (FCC Forms 314 and 340) by BTW to assign the license of Station KEEF-TV to HCCN; and (d) an opposition to the petition for reconsideration, filed by Mary Woodfork on June 12, 1989.

## BACKGROUND

2. Mary Woodfork is one of a group of BTW's original board of directors which claims control of the permittee. Booker T. Wade, Jr. is the major principal of the other competing group. Woodfork's group filed an informal objection on October 14, 1987, against BTW's applications for a modification of KEEF-TV's construction permit and a covering license. After a series of pre-designation pleadings, this proceeding was designated for hearing by *Order to Show Cause, Hearing Designation Order and Notice of Apparent Liability*, FCC 88-280, released September 12, 1988 (*HDO*), to determine whether the construction permit for Station KEEF-TV, Los Angeles, California should be revoked. The *HDO* specified issues to determine whether control of BTW, the station's permittee, was transferred without Commission approval, in violation of Section 310(d) of the Communications Act of 1934, as amended, and whether misrepresentations to the Commission were made in connection with the unauthorized transfer of control. The case was assigned to Administrative Law Judge Joseph Chachkin, who scheduled the hearing for March 27, 1989, in Los Angeles. On February 17, 1989, during the pre-trial discovery phase of the proceeding, BTW filed with the Presiding Judge a "Petition for Minority Distress Sale and Petition for Stay of Proceeding." Therein, BTW indicated that it would sell KEEF-TV to David J. Greco and/or an entity to be named later. The Presiding Judge denied BTW's petition because it contained numerous substantive defects. Specifically, BTW failed to identify the other entity and failed to demonstrate that Greco was a minority. Also, BTW did not provide underlying documentation to justify the specified $3 million purchase price and failed to establish that it had the authority to sell the station. *Memorandum Opinion and Order*, FCC 89M-733, released March 7, 1989.

3. Thereafter, on March 17, 1989, a hearing session was held during which the parties' direct case exhibits were identified and received into evidence. This session was the final event before the scheduled commencement of the field phase of the hearing in Los Angeles on March 27, 1989. On March 22, 1989, however, BTW requested a two-week stay from the Review Board, claiming that it needed extra time to conclude a sale of the station to another proposed distress sale purchaser, HCCN. The Board granted BTW's request. *Memorandum Opinion and Order*, FCC 89R-18, released April 3, 1989, *recon. denied*, FCC 89R-20, adopted March 24, 1989. [3] Also, on March 22, 1989, BTW and HCCN filed an Emergency Petition for Special Relief seeking a minority distress sale of Station KEEF-TV. In a letter dated April 14, 1989, that petition was denied by the Acting Chief, Mass Media Bureau, and the underlying assignment application was returned as unacceptable for filing. The Bureau took this action for two reasons: (a) it was unclear who has the authority on behalf of BTW to assign the station's construction permit, pursuant to Section 310(d) of the Communications Act of 1934, as amended, in light of the pending issues in the revocation proceeding; and (b) the ruling in *Shurberg Broadcasting of Hartford Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), which invalidated the Commission's minority distress sale policy.[4]

## THE PLEADINGS

4. In seeking reconsideration of the Bureau's denial of their March 22, 1989, petition for special relief, BTW and HCCN advance four points. First, they claim that the Bureau approved a distress sale in *KOZN FM Stereo 99, Ltd.*, DA 88-204, released February 25, 1988, notwithstanding the pendency of unresolved ownership issues in that case. Second, petitioners argue that no disputed owner of BTW has opposed the distress sale. In this regard, BTW and HCCN submit that a pleading filed on February 27, 1989, by Mary Woodfork and Gary Cordell, which opposed any distress sale by BTW, was "defective." Petitioners' third argument is that the Commission does not have jurisdiction to determine the underlying issues in the revocation proceeding. Rather, they submit that this case involves a question of the ownership and control of a California corporation which can only be determined by a California court. Therefore, petitioners argue that the unresolved issues in this proceeding are not an impediment to the Commission's grant of their proposed distress sale. Moreover, petitioners allege that there is no specific issue as to the composition of BTW's Board of Directors and that therefore no impediment exists to the grant of their distress sale request. Finally, petitioners state that the Bureau should recuse itself from consideration of any distress sale because of "an inherent conflict of interest . ..

as a party and prosecutor in this proceeding . . . ." In opposing petitioners' request, Woodfork maintains that she is the true owner of the construction permit, and that she has never approved a sale of KEEF-TV to HCCN.

## DISCUSSION

5. Section 1.106(c) of the Commission's Rules provides that a petition for reconsideration will be entertained only if it relies on newly discovered facts or if consideration of the facts presented is in the public interest. The Bureau has carefully reviewed all of petitioners' four arguments and concludes that none of these arguments satisfies either of the rule's requirements. Petitioners' first argument regarding the Bureau's ruling in *KOZN* is not a newly discovered development. In fact, the Bureau's approval of a distress sale in that case occurred over one full year before petitioners' March 22, 1989, petition for special relief. Moreover, petitioners are mistaken in citing *KOZN* for the proposition that the Bureau has approved a distress sale of a broadcast station where an unresolved issue existed under Section 310(d) of the Communications Act of 1934, as amended. There was no question in that case as to which entity controlled the licensee. Rather, the issue was whether the owner of a station was an alien in violation of Section 310(b)(1). That issue is distinguishable from a Section 310(d) question involving a determination of the *identity* of the individual(s) who is or should be in control of a broadcast station.[5]

6. Petitioners' second argument is simply wrong. Specifically, two disputed owners of KEEF-TV have indeed opposed a distress sale of the station. On February 27, 1989, Mary Woodfork and Gary Cordell filed an opposition to a proposed distress sale from BTW to David Greco.[6] Moreover, Woodfork and Cordell also made it clear that they opposed a distress sale of the station from Booker T. Wade, Jr., to any entity. In fact, Woodfork and Cordell stated that "we still want to be the permittee of the construction permit for Channel 68." Furthermore, Woodfork's instant opposition reiterates this position.

7. Petitioners' third argument that the Commission does not have jurisdiction to determine the underlying issues in this proceeding, including the composition of BTW, is a reiteration of an argument previously made to and rejected by the Bureau. It is firmly established that reconsideration will not be granted "merely for the purpose of again debating matters on which [the ruling body] had once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), *rehearing denied*, 384 U.S. 947 (1966), *petition to reopen denied*, 4 FCC 2d 608 (1966). As the Bureau ruled earlier, it is the singular province of the Commission to determine who is or should be in control of a broadcast facility. *See* 47 U.S.C. Section 310(d). As a corollary proposition, it is elemental that a state court cannot usurp this authority by determining who is in control of the entity holding a Commission-issued construction permit or license. *See Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Stenger v. Stenger Broadcasting Corp.*, 28 F. Supp. 407 (M.D. Pa. 1939).[7] Moreover, the Bureau believes that a determination of the composition of BTW's Board of Directors is essential to a resolution of the specified issues in this proceeding. Thus, since the transfer of control issues are still unresolved, petitioners are wrong in their contention that there is no bar to a distress sale at the present time.

8. Finally, the Bureau rejects petitioners' argument that the Bureau cannot objectively reconsider the instant distress sale petition. Initially, the Bureau notes that the Commission has expressly delegated to the Bureau the responsibility of reviewing distress sale requests and ruling thereon. *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 858 (1982). Moreover, the Bureau objectively reviewed petitioners' first such request and we have done so herein and again conclude that the requested relief must be denied. To the extent, however, that petitioners continue to maintain this final argument, the proper vehicle for relief is to file an application for review with the Commission of the Bureau's disposition of their distress sale request. *See* Section 1.115 of the Commission Rules.

9. Accordingly, pursuant to Section 1.106(j) of the Commission's Rules, IT IS ORDERED that the "Petition for Reconsideration of Dismissal of Distress Sale Application" filed by BTW and HCCN IS DENIED; and the related "Emergency Petition for Special Relief" and assignment application ARE DISMISSED pursuant to Section 1.106(b)(3) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

## FOOTNOTES

[1] This petition was originally filed on March 22, 1989, and supplemented on March 28, 1989.

[2] *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978).

[3] On April 5, 1989, BTW and HCCN requested the Review Board to extend the stay. However, by *Memorandum Opinion and Order*, FCC 89R-24, released April 17, 1989, the Board refused to do so.

[4] Thus, the Bureau did not reach the question of whether the assignment is barred by Sections 73.3597 (c) and (d) of the Commission's Rules. Inasmuch as the contemplated assignment involves a construction permit, any assignment application, if accepted, would need to be evaluated for compliance with those Rules.

[5] Petitioners also contend that the Bureau's April 14, 1989, denial of its distress sale proposal is inconsistent with the Bureau's treatment of *Pan Pacific Television, Inc.*, MM Docket No. 88-514. However, that distress sale proposal was also dismissed, by letter of June 2, 1989.

[6] Woodfork and Cordell are not attorneys. Previously they were represented by Daniel Simms, Esquire and now they are acting *pro se*. They are both separate and independent parties to the revocation proceeding, as is the Bureau. The Bureau rejects petitioners' suggestion that the Bureau represents Woodfork or Cordell.

[7] Moreover, on May 31, 1989, Judge Philip M. Saeta, of the Superior Court of California, County of Los Angeles, stayed the lawsuit by BTW against Mary Woodfork, *et al.*, because the "FCC and not this court has jurisdiction to determine who is or should be in control of Plaintiff." (C660873).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

VIRGIN ISLANDS TELEPHONE CORPORATION

Request for Waiver of Commission Requirements for Cost Support Material To Be Filed with January 1, 1990 Access Tariff Revisions

**ORDER**

**Adopted: November 1, 1989; Released: November 14, 1989**

By the Chief, Common Carrier Bureau:

1. On October 18, 1989, the Virgin Islands Telephone Corporation (Vitelco) filed a request for waiver of the schedules and procedures established for the November 2, 1989, filing of revisions to local exchange carrier (LEC) access tariff rates to be effective January 1, 1990.[1]

2. Under the Access Charge Rules, Part 69 of the Commission's Rules, 47 CFR Part 69, most LECs are required to update their access tariffs each year to retarget rates and to implement changes in Commission rules and schedules, based upon projections of costs and demand in the upcoming year. For several years, the annual revisions were filed to become effective on January 1. In 1988, however, the Commission shifted the effective date for the 1989 filing to April 1, consolidated other scheduled tariff revisions, and adopted July 1 as the effective date for annual filings beginning in 1990.[2] As a result, tariffs which became effective on April 1, 1989, are to remain in effect until they are replaced on July 1, 1990. Because many LECs indicated that it would be difficult for them to develop reliable forecasts extending from their January 1989 filing date (for the April 1 tariffs) into the first half of 1990, the Bureau allowed the LECs to base their April 1, 1989, rates on an April-through-December 1989 test year. We also stated that we would require the LECs to make a simplified flow-through filing effective January 1, 1990, to reflect important separations rule changes. [3] The *TUF Order* describes that flow-through filing.

3. The Tariff Update Format (TUF) adopted in the *TUF Order* requires carriers to recast the projected cost and demand figures in their projected annual 1989 filings to reflect adjustments in the current rates. As a consistent starting point for all LECs, we stated that we would use the rates in effect on September 1, 1989, and the 1989 cost and demand figures implied by those rates as the baseline for LEC updates.[4] We set September 11, 1989, as the deadline for submitting all requests for waivers of the requirements of the *TUF Order*.[5]

4. Vitelco argues that its baseline cost and demand figures are no longer relevant because of the catastrophic effects of Hurricane Hugo on the U.S. Virgin Islands and the abrupt and drastic change in Vitelco's operations caused by the hurricane. According to Vitelco, the hurricane destroyed virtually all of its outside plant on the island of St. Croix and left only 55 percent of its access lines working on St. Thomas. Vitelco states that it has been able to restore only 10 percent of service.[6] Under the circumstances, Vitelco requests permission to forego the TUF filing.

5. We find that Vitelco has shown good cause for waiver of the TUF filing requirement. Vitelco also indicates in its petition that it plans to file an application for special permission in which it will explain the details of the tariff filing it will seek to make in lieu of the November 2 filing required by the *TUF Order*.[7] After this application is filed, the Bureau will consider the type of cost and demand showing Vitelco will be required to make in connection with any proposed rate changes.

6. Accordingly, IT IS ORDERED that the request for waiver filed by the Virgin Islands Telephone Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**FOOTNOTES**

[1] Commission Requirements for Cost Support Material To Be Filed with January 1, 1990 Access Tariff Revisions, 4 FCC Rcd 6773 (Com.Car.Bur. 1989) (*TUF Order);* Commission Requirements for Cost Support Material To Be Filed with January 1, 1990 Access Tariff Revisions, Memorandum Opinion and Order, DA 89-1255, released Sept. 29, 1989 (Com.Car.Bur.) (*Supplementary TUF Order).*

[2] Access Tariff Filings Schedules, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988).

[3] Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, DA 88-1554 (Com.Car.Bur. 1988).

[4] *TUF Order*, 4 FCC Rcd at 6773.

[5] *Id.* at 6774-75.

[6] Vitelco Petition at 2.

[7] *Id.*

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

Lauderdale-McKeehan Christian Broadcasting Corporation — File No. BPH-870106MD

For Construction Permit
for a New FM Station on Channel 256A
in Loudon, Tennessee

## MEMORANDUM OPINION AND ORDER

**Adopted: October 24, 1989; Released:November 15, 1989**

By the Commission:

1. The Commission has under consideration: (1) a petition for reconsideration, filed March 10, 1988 by Lauderdale-McKeehan Christian Broadcasting Corporation ("McKeehan"), of the dismissal of the captioned application in the *Hearing Designation Order* in MM Docket No. 88-54 (Loudon, Tennessee), 3 FCC Rcd. 796 (M.M. Bur. 1988) ("Loudon HDO"); and (2) related pleadings.[1]

2. McKeehan's application, filed January 6, 1987, was returned for failure to include Section II, page 2, of FCC form 301, which includes in Items 3(a) and 3(b) questions pertaining to the applicant's compliance with the alien ownership provisions of the Communications Act of 1934, as amended. 47 U.S.C. § 310(b). Pursuant to the FM "hard look" procedures instituted by the Commission in its *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985) ("*Report and Order*"), an applicant must meet all of the tenderability requirements set forth therein by the close of the relevant filing window. The "hard look" policy has served the public interest by reducing the number of hastily prepared, frivolous and speculative filings received during a period when the Commission experienced a large influx of new FM applications. It has also streamlined processing procedures to make more efficient use of staff and other resources. *See , e. g., Star Signal Corporation*, 1 FCC Rcd 450 (1986); *James C. Rogers, III*, 2 FCC Rcd 5536 (1987). In Appendix D to the *Report and Order* we specifically stated that failure to respond to the questions concerning certification of compliance with 47 U.S.C. § 310 (b) renders the application so fundamentally defective that further processing is unwarranted. The McKeehan application was therefore not tenderable as filed and was inadvertently accepted for tender and filing. Accordingly, it was dismissed in the Loudon HDO.

3. In its petition for reconsideration, McKeehan states that "it is beyond our imagination" how Section II, page 2, of FCC form 301 could have been omitted and that "(w)e are positive that the certification [sic] was in the completed application, as it is still in copies we kept for public inspection and for hearing purposes." (Petition, at page 2.) It also submits its purported file copy of the missing Section II, page 2, and an affidavit from Arthur Wilkerson, a local broadcaster who helped prepare its application, stating that the application in McKeehan's public inspection file also contains Section II, page 2, of FCC form 301.[2]

4. McKeehan does not allege that the application it submitted contained Section II, page 2. It only professes an inability to explain why it was not included. Moreover, Mr. Wilkerson's affidavit merely attests to the presence of Section II, page 2, in the applicant's public inspection file. However, careful staff review indicates that the page was not included in any of the three copies submitted to the Commission.

5. To properly lie, a petition for reconsideration of a finding of untenderability and a request for *nunc pro tunc* reinstatement of the application in question must demonstrate that findings of fact and/or conclusions of law concerning the tenderability of the application *as originally filed* were erroneous. *See* the *Report and Order*, *supra*, at para. 31, and 47 C.F.R. § 1.106(d)(2). Based upon the foregoing, we conclude that McKeehan's petition provides no reason to disturb the Mass Media Bureau's dismissal of the McKeehan application.

6. Accordingly, IT IS ORDERED, That pursuant to Section 1.106(j) of the Commission's Rules, McKeehan's petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

### FOOTNOTES

[1] These include: a "Motion to Strike" the petition for reconsideration filed on April 29, 1988, and a "Supplement to Motion to Strike and Request for Expedited Consideration" filed on June 24, 1988, both by Loudon Broadcasters, Inc., an applicant in the Loudon proceeding.

[2] We note that two copies of the purported missing page were subsequently submitted on separate occasions by McKeehan after the close of the filing window. Each was represented when filed to be a copy of McKeehan's file copy of Section II, page 2, in the application as originally prepared. However, these copies are not identical, in that certain answers on one are hand-checked and the same answers on the other are typed.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-483**

In re Applications of

LONNIE W. HUTTO
d/b/a IBC BROADCASTING File No. BPH-871127MA
(hereafter "IBC")

NEW SOUTH COMMUNICATIONS, INC. File No. BPH-871201MD
(hereafter "NSC")

ALFRED T. MOORE, JR., & WILLIAM D. HENDRIX, JR. File No.BPH-871203ND
d/b/a CENTRAL BROADCASTING CO.
(hereafter "CBC")

A. E. FRYAR, JR. d/b/a FRYAR COMMUNICATIONS File No. BPH-871203NG
(hereafter "Fryar")

For Construction Permit for a New FM Station
in Alexandria, Louisiana on Channel 230A (93.9 MHz).

**HEARING DESIGNATION ORDER**

**Adopted: October 20, 1989 Released: November 15, 1989**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. NSC has not completed Item 4 correctly. NSC's application gives a post office box number as the residence address for Frank E. Holladay, Ann S. Holladay, and Kenneth R. Rainey. Accordingly, NSC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. CBC. William Hendrix, Jr., 49% general partner of the referenced application, is marketing director of station KBCE(FM), Boyce, Louisiana. The 70 dBu contours of KBCE(FM) and CBC's proposed facility would overlap in contravention of 47 C.F.R. § 73.3555 thus triggering, in this instance, a potential cross-ownership problem. However, Mr. Hendrix has indicated his intent to terminate his relationship with station KBCE(FM) in the event of a grant of the referenced application. Accordingly, in the event of grant of CBC's application, Mr. Hendrix will be required to severe all connections with station KBCE(FM) prior to commencement of program test authority.

4. CBC's application also included a request for waiver of the principal community coverage, 47 C.F.R. § 73.315(a) and (b). CBC stated that from the proposed site, 100% of the population of Alexandria, Louisiana, would receive a 3.16 mV/m or greater signal, and more than 99% of the total land area of Alexandria, Louisiana would receive a 3.16 mV/m or greater signal. In addition, CBC states that the remaining area not receiving the requisite signal is undeveloped swamp area. Consequently, CBC has demonstrated compliance with 47 C.F.R. § 73.315. Furthermore, the FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). Accordingly, CBC's request for waiver will be dismissed as moot.

5. CBC petitioned for leave to amend its application on the dates shown below. The accompanying amendments were filed after the last date for filing amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

March 30, 1988; June 29, 1988;
October 6, 1988; November 23, 1988

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That NSC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That, in the event of grant of CBC's application, William Hendrix, Jr. will be ordered to divest himself of all interests in and sever all connections with Station KBCE(FM), Boyce, Louisiana prior to the commencement of program test authority.

10. IT IS FURTHER ORDERED, That CBC's request for waiver of 47 C.F.R. § 73.315 (a) and (b) IS HEREBY DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by CBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-506**

In re Applications of

HERRERA BROADCASTING PARTNERSHIP (hereafter Herrera) File No.BPH-880301MU

GREAT SCOTT BROADCASTING (hereafter Great Scott) File No. BPH-880301MY

For a Construction Permit
for a New FM Station on
Channel 299A in Merced, California

**HEARING DESIGNATION ORDER**

**Adopted: October 20, 1989 Released: November 15, 1989**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Great Scott.* An informal objection has been filed by Radio One, Inc. (Radio One), licensee of KYOS(AM), Merced, California, against Great Scott Broadcasting regarding the proximity of Scott's proposed tower structure to the KYOS(AM) directional antenna array. Radio One, Inc. states that, since the proposed tower will be only 1.02 kilometers away from their directional array, it will introduce reradiation which would distort the KYOS directional pattern. Radio One believes that such distortion probably cannot be corrected. Although no supporting data has been provided, Radio One further cites the Commission's Public Notice entitled *Standard Broadcast Reradiation and Tower Construction Authorized Under 22 of the Rules*, Mimeo No. 4396, released August 11, 1987, which was issued to remind cellular radio applicants of the necessity of protecting AM radio stations from reradiation due to new tower construction. The responsibilities of applicants proposing such towers are outlined therein, which include before-and-after-construction measurements of the AM directional array pattern and the installation and maintenance of any necessary detuning apparatus.

3. When an FM applicant seeks to build or modify a tower within 2.0 miles of an AM station's directional array, the Commission recognizes the possibility that the AM's directional pattern may be altered. In such cases the Commission has held that a licensee building a new facility is obligated to take all the necessary steps, including the financial burden, to correct interference problems caused by new or modified construction. *See* 47 C.F.R. § 73.316(h). In such cases the construction permit will be granted with the following condition:

> "Prior to construction of the FM tower authorized herein, permittee shall notify AM station KYOS so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the aforementioned AM station. Both prior to construction of the FM tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by 47 C.F.R. § 73.154(a), shall be conducted to establish that the AM array has not been adversely affected and, BEFORE FM PROGRAM TESTS COMMENCE, the results submitted to the Commission and to the AM station."

4. Accordingly, any construction permit issued to Great Scott will contain this condition. In light of the precautionary measure taken herein, the informal objection filed by Radio One will be denied.

5. *Unresolved Issues.* Information before the Commission indicates that Herrera was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

| City/State | Docket No. |
|---|---|
| Solona, Florida | 87-464 |
| Rockledge, Florida | 87-556 |
| Silver Springs, Florida | 88-119 |
| East Ridge, Tennessee | 88-122 |
| Oliver Springs, Tennessee | 88-201 |
| Des Moines, Iowa | 88-238 |
| Nags Head, North Carolina | 88-277 |
| Tyler, Texas | 88-280 |
| Raleigh, North Carolina | 88-306 |
| Sedona, Arizona | 88-335 |
| Mableton, Georgia | 88-400 |
| Evansville, Indiana | 88-403 |
| Swanton, Ohio | 88-432 |
| Atlantic City,New Jersey | 88-433 |

Identical issues were specified in each of the above proceedings: whether or not Sonrise is a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issues. These unresolved character issues call into question Herrera's qualifications to be a Commission licensee. Therefore, such issues will be specified against Herrera in this proceeding.

6. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

| APPLICANT | AMENDMENTS FILED |
|---|---|
| Herrera | 11/16/88; 11/22/88; 2/13/89; 9/13/89 |
| Great Scott | 6/1/88 |

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Herrera have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Herrera would constitute a hazard to air navigation, an issue which respect thereto will be included and the FAA made a party to the proceeding.

8. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Herrera and Great Scott have not completed Item 4 correctly. The Herrera application gives a post office box number as the residence address for E. C. Sanders, Jr., and Jimmy N. Williams; Great Scott lists only post office box numbers for Great Scott Communications, Inc., the Scott Marital Trust, Faye Scott, Elmer S. Friedberg, Harold Litvin and Marc, Mitchell, Jeffrey, Karen and Todd Scott. Accordingly, Herrera and Great Scott must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party-in-interest to the application of Herrera Broadcasting Partnership.

2. To determine whether Herrera Broadcasting Partnership's organizational structure is a sham.

3. To determine, based on the evidence adduced pursuant to issues 1 and 2 above, whether Herrera Broadcasting Partnership possesses the basic qualifications a Commission licensee.

4. To determine, with respect to Herrera, whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED That any construction permit issued to Great Scott as a result of this proceeding shall contain the condition specified in paragraph 3 above.

13. IT IS FURTHER ORDERED That the informal objection filed by Radio One, Inc., against Great Scott is HEREBY DENIED.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration is MADE A PARTY with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Herrera, and Great Scott ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That Herrera and Great Scott must file the amendment called for in paragraph 8 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C § 73.3594, give notice of the hearing within the time and in the manner therein prescribed and shall advise the Commission of the publication of such notice as required by Section 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**FOOTNOTE**

[1] Pursuant to its request dated August 21, 1989, the application of George S. Flinn, Jr was dismissed by letter October 5, 1989.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-505**

In re Applications of

HAROLD MCEWEN (hereafter "McEwen") — File No. BPH-870827MA

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. (hereafter "Southwest") — File No. BPED-870827MH

OKLAHOMA RADIO LIMITED PARTNERSHIP (hereafter "ORLP") — File No. BPH-870827MU

AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "AIBG") — File No. BPH-870827NG

ARTHUR PATRICK (hereafter "Patrick") — File No. BPH-870827NT

For Construction Permit
for a New FM Station
in Lawton, Oklahoma
Channel 297C2 (107.3 MHz)

## HEARING DESIGNATION ORDER

**Adopted: October 20, 1989; Released: November 15, 1989**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On June 17, 1988, Patrick filed a timely petition to dismiss or deny against Southwest, a nonprofit corporation, proposing to use nonreserved Channel 297C2, for educational programming. All the matters Patrick seeks to raise have been disposed of with respect to Southwest in *Boles - American Indian, A Partnership*, 4 FCC Rcd 2465 (1989). Accordingly, for the reasons stated therein Patrick's petition will be dismissed.

3. *Southwest.* The tower data submitted by Southwest in response to Section V-G, Item 5 of FCC Form 340 (May 1985) is inconsistent with the data contained in the Commission's records for the existing tower structure. In its application the tower's overall height above ground (AGL) is listed as 160 meters and its overall height above mean sea level (AMSL) is listed as 539 meters. However, Commission's records indicate that the tower at the coordinates specified in Southwest's application was cleared by the FAA for heights of 107 meters AGL and 485 meters AMSL. Therefore, Southwest must either file an amendment correcting the tower heights listed in its application, submit documentation to establish that the heights specified are, in fact, correct and the Commission's records are in error, or provide FAA airspace clearance for the increased tower structure.[1] In addition, an air hazard issue will be specified.

4. *ORLP.* ORLP specified in its application that it is a limited partnership consisting of a general partner, John C. and Ninfa S. Brandt, and a limited partner, Oklahoma Radio Partnership. However, ORLP failed to provide an insulation statement wholly satisfying the requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604, 618 (1985).[2] In order to ensure its application's compliance with the Commission's multiple ownership rules and cross-interest policy, ORLP will be required to file with the presiding Administrative Law Judge an amendment within 30 days of the release of this Order.

5. Information before the Commission indicates that ORLP was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

| City/State | Docket No., |
|---|---|
| Solona, Florida | 87-464 |
| Rockledge, Florida | 87-556 |
| Silver Springs, Florida | 88-119 |
| East Ridge, Tennessee | 88-122 |
| Oliver Springs, Tennessee | 88-201 |
| Des Moines, Iowa | 88-238 |
| Nags Head, North Carolina | 88-277 |
| Tyler, Texas | 88-280 |
| Raleigh, North Carolina | 88-306 |
| Sedona, Arizona | 88-335 |
| Mableton, Georgia | 88-400 |
| Evansville, Indiana | 88-403 |
| Swanton, Ohio | 88-432 |
| Atlantic City, New Jersey | 88-433 |

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question ORLP's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against ORLP in this proceeding.

6. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an

interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. ORLP responded to Item 5(e) in the negative, which was correct as of August 27, 1987, the date of filing. However, Commission records indicate that Thomas F. Metz, a limited partner in ORLP, was a principal in the Sedona, Arizona, proceeding, MM Docket No. 88-335, in which character issues were added on October 19, 1988. However, ORLP has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified below.

7. *AIBG*. AIBG has indicated that a financial "misrepresentation" issue has been specified against an application it has pending in a proceeding for a new FM station at San Angelo, Texas. In view of the serious nature of the issue involved, any grant of AIBG's application for a construction permit in the instant proceeding shall be conditioned upon the outcome of that proceeding.

8. *Other matters*. Since no determination has been received from the Federal Aviation Administration as to whether the antennae proposed by Southwest and ORLP would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

9. *Late - Filed Amendments*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after October 3, 1987, the last date for filing minor amendments as of right. On November 3, 1987, McEwen filed an amendment to change its transmitter location and to notify the Commission of changes in the legal portion of its application. Pursuant to 47 C.F.R. § 73.3522(a), all amendments filed outside the specified periods for amendments as of right and prior to designation for hearing must be accompanied by a showing of good cause, or filed pursuant to 47 C.F.R. §§ 1.65 or 73.3514. Unauthorized or untimely amendments are subject to return by the Commission's staff without consideration. McEwen's engineering amendment was not accompanied by a showing of good cause, and cannot be considered under either §1.65 or §73.3514. Accordingly, the engineering portion of McEwen's November 3, 1987 amendment will be returned. Under 47 C.F.R. § 1.65 all of the amendments listed below are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from such amendments will be disallowed.

| Applicants | Amendments Filed |
|---|---|
| McEwen | November 3, 1987 (Legal Only) |
| Southwest | April 18, 1988 (Coverage Contours) |
| ORLP | November 5, 1987, October 27, 1988 and May 31, 1989, September 13, 1989 |
| AIBG | October 27, 1987; April 28 and July 11, 1988; February 17, June 1, August 8, and September 7, 1989 |

10. *Other matters*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Southwest and/or ORLP would constitute a hazard to air navigation.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of ORLP.

3. To determine whether ORLP's organizational structure is a sham.

4. To determine whether ORLP violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report: (1) the designation of character issues against another applicant in which one of its partners has an ownership interest; and (2) the dismissal of such applications with unresolved character issues pending.

5. To determine, from the evidence adduced pursuant to Issues 2 through 4 above, whether ORLP possesses the basic qualifications to be a licensee of the facilities sought herein.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the petition to dismiss or deny filed by Patrick IS HEREBY DISMISSED.

14. IT IS FURTHER ORDERED, That ORLP shall submit to the presiding Administrative Law Judge an amendment to its application pursuant to paragraph 4 hereinabove, within 30 days of the release of the Order.

15. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to AIBG as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate in MM Docket No. 88-552.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED,That the engineering portion of McEwen's November 3, 1987, amendment IS HEREBY RETURNED, and that the petitions for leave to amend filed by McEwen, Southwest, ORLP and AIBG ARE GRANTED to the extent indicated, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**FOOTNOTES**

[1] By amendment submitted April 18, 1988, Southwest provided the information regarding its 70 dBu contour required for noncommercial educational applicants applying on a commercial frequency. Therefore, in the event Southwest amends its tower proposal in a manner which would alter its coverage contours, revised contour and coverage data must be submitted.

[2] In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that, by the terms of the partnership agreement, its limited partners will refrain from involvement in any material respect in the management or operation of the proposed station and, further, that no limited partner has any interest or connection of any nature with any broadcast station or other medium of mass communication operating within the service area of the proposed station that is or might be inconsistent with the Commission's cross-interest policy under the *Attribution Reconsideration Order*, 58 RR 2d 604, 618 (1985).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-493**

In re Applications of

Donald P. Harris d/b/a DESERT BROADCASTERS — File No. BP-860328AH
Rosamond, California
Req: 890 kHz, 1 kW, 500W-LA, DA-2, U

ROBERT BURDETTE & ASSOCIATES — File No. BP-870506AE
KGRB(AM) West Covina, California
Has: 900kHz, 0.5 kW, DA-D
Req: 900kHz, 5 kW, DA-A

Janice L. O'Brien d/b/a SAN MARCOS RADIO — File No. BP-870722AE
San Marcos, California
Req: 890kHz, 1 kW, 2.5kW-LS, DA-2, U

KDOL BROADCASTING CORPORATION — File No. BP-870722AH
Rosamond, California
Req: 890kHz, 1kW, 0.5kW-LS, DA-2, U

For Construction Permit

**HEARING DESIGNATION OREDER**

**Adopted: October 20, 1989; Released: November 15, 1989**

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the mutually-exclusive applications of Donald P. Harris d/b/a Desert Broadcasters ("Desert"), Robert Burdette & Associates ("RBA"), Janice L. O'Brien d/b/a San Marcos Radio ("San Marcos Radio") and KDOL Broadcasting Corporation ("KDOL").[1] Also, before us are petitions to deny filed by RBA against the application of San Marcos Radio, and by Desert against the KDOL proposal.[2]

2. *San Marcos Radio*. On January 26, 1989, RBA filed a petition to deny the application of San Marcos Radio, alleging that its application violates 47 C.F.R. § 73.37(a) by proposing overlap of its 0.5 mV/m contour to that of station KGRB, West Covina, California, and is thus unacceptable for filing and must be dismissed. As a preliminary matter, however, we find that the subject petition is procedurally defective under 47 C.F.R. § 73.3584 because it was filed more than 30 days after the "B" cut-off date of February 4, 1988 for the application of San Marcos Radio. Consequently, it must be dismissed on that basis. Consistent with the public interest, however, we will treat the above pleading as an informal objection pursuant to 47 C.F.R. § 73.3587, so that we may address the issues raised therein.

3. RBA alleges that San Marcos Radio's assertion of low conductivity toward KGRB, and therefore no overlap with that station's 0.5 mV/m contour, was based on faulty measurement points on the applicant's $215^0$ and $308^0$ radials. RBA argues that San Marcos Radio's measurement points on the $215^0$ radial cannot be considered because they were made at a distance of 50 kilometers from the KGRB site, which would place those points 13.4 kilometers over the Pacific Ocean without indicating how those points were determined over water. Further engineering study, however, has revealed that the applicant's measuring points extend, in the 215' radial, up to 35.5 kilometers from KGRB, thus placing them over land and completely reliable. RBA further challenges the reliability of the applicant's measurements made on its $308^0$ radial based on RBA's having obtained different values at measurement points 7, 8, 10, 12, 23, 24 and 25. The staff, however, has determined that no overlap exists between KGRB and San Marcos Radio's proposal based on either set of values. Finally, we find no merit to RBA's allegation that the applicant's measurements are unreliable inasmuch as they fail to take into account the effects of co-channel KPSI, Palm Springs, California, because RBA has failed to provide any data demonstrating how, if at all, the applicant's measurements would be altered by the existence of KPSI. Consequently, RBA's objection must, in all respects, be denied.

4. *KDOL*. A petition to deny has been filed by Desert against KDOL. This petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications* ; *Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in Desert's petition have not been considered and its petition must be dismissed. However, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

5. Section V-A, Paragraph 8 of the FCC Form 301 requires applicants to submit a specified type and number of photographs of the proposed site. KDOL, to date, has not complied with this requirement and an appropriate amendment is therefore required.

6. RBA has not indicated whether it has provided local notice of the filing of its application, as required by 47 C.F.R. § 73.3580(f). To aviod delay, we will waive 47 C.F.R. § 73.3564(c) on our own motion, and require RBA to provide local notice of its application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order. *See Seattle Public Schools*, 103 FCC 2d 862, 868 (1986).

7. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

| APPLICANT | AMENDMENTS FILED |
|---|---|
| Desert | September 8, 1987 |
| San Marcos Radio | December 23, 1987, July 11, 1988 |
| KDOL | September 27, 1988, March 24, 1989 |

8. Except as indicated by the issues specified below, all applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding. As the proposals are for different communities, we will specify an issue to determine pursuant to 47 U.S.C. § 307(b) which proposal would best provide a fair, efficient and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

9. Accordingly, IT IS ORDERED, That pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine: (a) the areas and populations which would receive primary aural service from each of the proposals, and the availability of other primary service to such areas and populations, and (b) in light thereof, and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it be concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-3 hereinabove, the petition to deny filed by RBA against the application of San Marcos Radio IS DISMISSED, and when considered as an informal objection, IS DENIED.

11. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 4 hereinabove, the petition to deny filed by Desert against the application of KDOL IS DISMISSED.

12. IT IS FURTHER ORDERED, That KDOL file the required antenna site photographs as specified in paragraph 5 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That 47 C.F.R. § 73.3564(c) IS WAIVED to the extent indicated herein, and that RBA shall file the amendment specified in paragraph 6 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the minor amendments filed by Desert, San Marcos Radio and KDOL ARE ACCEPTED to the extent indicated hereinabove, in accordance with 47 C.F.R. § 73.3522(a)(2).

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard and pursuant to 47 C.F.R. § 1.221(c), the applicants shall, within 30 days of the mailing of this Order, or in person or by attorney, file with the Commission, in triplicate, written appearances stating an intention to appear on the dates fixed for the hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, the applicants shall give notice of the hearing as therein prescribed, and shall advise the Commission of such publication as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief,
Audio Services Division
Mass Media Bureau

**FOOTNOTES**

[1] On July 11, 1988, San Marcos Radio filed an amendment to eliminate mutual exclusivity between itself and two other applications at Rosamond, California (BP-860328AH) and (BP-870722AH). Good cause was shown for this amendment and it is accepted for filing. However, no comparative benefit to San Marcos shall accrue from this amendment.

[2] Initially returned as unacceptable for filing, the RBA and KDOL applications were accepted *nunc pro tunc* their original submission dates in light of the applicants' timely-filed, curative minor amendments. As is our practice in such cases, we calculated timeliness with reference to our action returning to the proposals, and defined "minor amendment" in terms of 47 C.F.R. § 73.3571.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-538**

In re Applications of

| | |
|---|---|
| SARASOTA-CHARLOTTE BROADCASTING CORPORATION | File No. BPH-870908MX |
| CAWLEY BROADCASTING CORPORATION, INC. | File No. BPH-870910MM |
| ENGLEWOOD RADIO, INC. | File No. BPH-870910NS |
| SANDPIPER BROADCASTING, INC. | File No. BPH-870910OG |

For Construction Permit for a
New FM Station on Channel 290A in
Englewood, Florida

**APPEARANCES**

*Neal J. Friedman* on behalf of Sarasota-Charlotte Broadcasting Corp.; *Harry F. Cole* on behalf of Cawley Broadcasting Corporation, Inc.; *John D. Pellegrin* on behalf of Englewood Radio, Inc.; *Alan C. Campbell*, and *Peter H. Doyle* on behalf of Sandpiper Broadcasting, Inc. and *Robert Zauner* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF**
**ADMINISTRATIVE LAW JUDGE**
**WALTER C. MILLER**

**Issued: November 7, 1989; Released: November 15, 1989**

1. Originally thirteen mutually-exclusive applicants sought authority to operate a new FM station on Channel 290A in Englewood, Florida. See 53 F.R. 51585 published December 22, 1988. Four remain: (1) Sarasota-Charlotte Broadcasting Corporation (SCBC); (2) Cawley Broadcasting Corporation, Inc. (Cawley); (3) Englewood Radio, Inc. (ERI); and (4) Sandpiper Broadcasting, Inc. (Sandpiper).

2. After the interlocutory cycle had run its course, only the standard comparative issue and the ultimate conclusionary issue remain to be resolved:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

(2) To determine, in light of the evidence adduced pursuant to the specified issue(s), which of the applications should be granted, if any.

3. An additional matter must be considered under the standard comparative issue. The Chief, Audio Services Division has called for comparative coverage evidence. See 53 F.R. 51585 *supra.*, at para. 11.

4. We held the prehearing conference on March 16, 1989, an evidentiary admission session on April 13, 1989, and hearings on May 8 and 9, 1989. We closed the evidentiary record on May 9, 1989. See FCC 89M-1417, released May 11, 1989.

5. The four applicants and the Mass Media Bureau filed Proposed Findings of Fact and Conclusions of Law on July 5, 1989.[1] The four applicants filed Reply Findings on July 19, 1989.

**FINDINGS OF FACT**
**ISSUE 1 - THE STANDARD**
**COMPARATIVE ISSUE**

6. *Description of the Applicants*: *Sarasota - Charlotte Broadcasting Corporation* (*SCBC*), a Florida Corporation, has the following shareholders:

| Name | % of Stock Owned |
|---|---|
| E. J. "Ted" Ewing | 90.2% |
| Leah B. Lasbury, Trustee for Clyde and Leah B. Lasbury | 0.72% |
| Ruth B. Kuykendall | 2.16% |
| Leah B. Lasbury | 1.73% |
| Lois Tracy | 1.73% |
| James Bartlett, Jr. | 1.73% |
| Allen E. Bartlett | 1.73% |

7. *Cawley Broadcasting Corporation*: Cawley is a corporation with a sole stockholder, Augustine M. Cawley. Augustine Cawley is not only Cawley's sole stockholder, he serve as its President, Secretary, Treasurer and only Director.

8. *Englewood Radio Inc.*: ERI is a Florida Corporation.

The following four individuals are ERI's officers, directors, and stockholders:

**CHART**

| Name | Equity Percentage | Office/Director |
|---|---|---|
| Leslie J. Barnett | 25% (1,000 shares) | President, Director |
| Sam J. Blum | 25% (1,000 shares) | Vice-Pres., Director |
| James W. Cole | 25% (1,000 shares) | Secretary, Director |
| Herb Swarzman | 25% (1,000 shares) | Treasurer, Director |

9. *Sandpiper Broadcasting, Inc.*: Sandpiper is a two tier Florida Corporation; *i.e.*, it has issued both voting and non-voting stock. The following chart shows the status of Sandpiper's four stockholders:

**CHART**

| Name | Equity Percentage | Stock Interest | Office/ Director |
|---|---|---|---|
| John E. Piper | 16.67% | 50% voting stock | President, Treasurer, Director |

| | | | |
|---|---|---|---|
| Patricia A. Poper | 16.67% | 50% voting stock | Vice-Pres.,Sec./-Dir. |
| William F. Piper | 33.33% | 50% non-voting | |
| William F. Piper, II | 33.33% | 50% non-voting | |

10. The two voting stockholders John E. and Patricia Piper are husband and wife. William F. Piper is the father of John E. Piper and William F. Piper, III.

***Diversification of Mass Media***

11. *Sarasota - Charlotte Broadcasting Corporation*: *SCBC* is the licensee of WENG(AM), Englewood, Florida (1530 kHz, 1 Kw, daytime only). They exchanged exhibits which, *inter alia*, pledged to divest themselves of their AM station if their FM application is granted. However, those exhibits were rejected because SCBC was impermissibly trying to upgrade its comparative position. The Presiding Officer specifically ruled that SCBC's proffered exhibits varies substantially from both their application, and their application as amended. (Tr. 72-81; FCC 89M-1246, released April 21, 1989; and FCC 89M-1305 released April 28, 1989 at Footnote 2). So, for diversification purposes, SCBC will be charged with it WENG(AM) holding.

12. *Cawley Broadcasting Corporation*: The corporation itself holds no other broadcast interests. But Augustine (Gus) Cawley, the corporation's sole stockholder and its President, Secretary, and only Director does have other broadcast interests.

13. Mr. Cawley is the sole stockholder, officer and director of Kissimmee Broadcasting, Inc., the licensee of WMJK(AM), Kissimmee, Florida (1Kw days, 27w nights). He is also the sole stockholder, officer, and director of Vineland Broadcasting, Inc., the licensee of WWBZ(AM), Vineland, New Jersey (5 Kw days, and 1 Kw nights).

14. Gus Cawley says that if he receives his Englewood grant he will divest himself of all interests in and connection with *both* WMJK(AM) and WWBI(AM). The record shows that he acquired those stations in October 1986 (Tr. 144), and that about two years later he opened discussions with a media broker looking to sell both stations. So it appears that Cawley will sell his Kissimmee and Vineland holdings whether he receives his Englewood grant or not. But there is one thing about Cawley's divestment pledge that is perplexing. Why would Cawley want to sell a station in Kissimmee, Florida (population - 13,487) and another in Vineland, New Jersey (population - 53,753) to obtain a station in the much smaller Englewood, Florida (population - 5,108) market? Thus there are *some* facts of record that causes us to wonder whether Gus Cawley can and will fulfill his divestment pledge.

15. But there are *other* facts of record that tend to dispel that doubt. In fact, Cawley appears to be a born "trafficker." In 1975 he acquired a 11.1% interest in WWOM, Albany, New York; he disposed of that interest in 1979. In 1979, he became the sole owner of WIPS(AM), Ticonderoga, N.Y., and the following year he became the sole owner of WXTY(FM) in Ticonderoga; he sold that AM-FM combination in 1983. In 1983 he acquired the majority interest in WENU(FM), Hudson Falls, New York, and WEFN(AM) in adjacent Glens Falls, New York. He sold that AM-FM combination in 1986, the same year he acquired his Kissimmee and Vineland Stations. So the chances are very good, given his "trafficking" propensities, and even though he is moving from two larger markets to a much smaller one, that Cawley will keep his divestment pledge.

16. Gus Cawley has held ownership interests in seven licenses and construction permits since 1975. The longest time that he has held any of these interests is four years. He disposed of his interest in one construction permit before the station even went on the air, and sold another station one year after it went on the air. Moreover, as noted (Finding 14 *supra*.) Cawley put the two stations he currently owns on the market two years after he purchased them.

17. The following record colloquy (at Tr. 152-153) tells the story:

> Q: How would you describe your career?
>
> [Cawley] A: As a Broadcaster.
>
> Q: As a broadcaster or constructor of broadcast stations? Is -- do you see the difference?
>
> A: I see the difference . . . yeah.
>
> Q: And what are you?
>
> A: Well, I'm a fella who started up in the north country of New York State, and it gets awfully cold up there and I am just trying to find someplace that's warmer.
>
> Q: But your forte, if I understand your testimony earlier, your forte is putting -- constructing stations and putting them on the air isn't it?
>
> A: I've done it a few times, yeah.
>
> Q: And once they're on the air and established, you sell and move on. Isn't that a fair description of your career?
>
> A: So far, yes . . .

18. Thus the real question is not whether Augustine Cawley will honor his divestment pledge to sell WMJK(AM) and WWBZ(AM). The real question is how long will he remain in Englewood if he is granted the CP. In this era of deregulation "trafficking" is no longer a Commission tabu and is considered legal.[2] However, and even though "trafficking" is no longer condemned, Augustine Cawley's propensity to speculate in licenses can and will be considered in evaluating his qualitative integration. Stated another way, speculative propensities cast an aura of instability and impermanence over an integration proposal, and must be weighed comparatively.

19. *Englewood Radio, Inc.*: Neither ERI nor any of its officers, shareholders or directors has any ownership interests in any media of mass communications.

20. *Sandpiper Broadcasting, Inc.*: Sandpiper was formed in 1986 to obtain a new FM station in Holmes Beach, Florida. The *Holmes Beach* case settled out, and Sand-

piper, the sole general partner of Sandpiper Limited Partnership, received a one-seventh interest in the merged entity. However, Sandpiper will divest its in terest in the Holmes Beach CP if their Englewood application is granted.

21. *Diversification: Intermediate Findings.* Based on Findings 11-20 *supra.*, certain intermediate diversification findings are warranted. ERI is clear on diversification, and both Cawley and Sandpiper have no attributable interests by virtue of their acceptable divestment pledges. Thus, Cawley, ERI, and Sandpiper are entitled to and will be awarded a *substantial* and *decisional* comparative preference over SCBC, who owns an AM facility in the proposed community of license, Englewood.

*Best Practicable Service*

22. *Comparative Coverage.* The following table depicts the total areas and populations within the applicants' predicted 1 mV/m service contours. The table is based on the lower coverage of each applicant as of the "B" cutoff date or its most recent engineering amendment.

TABLE

| Applicant | Area (sq. Km) | 1980 Census population |
|---|---|---|
| SCBC | 711.6 | 65,451 |
| Cawley | 437.1 | 35,605 |
| Englewood | 711.6 | 65,080 |
| Sandpiper | 711.6 | 68,823 |

23. All proposed service areas presently receive five or more primary FM services both day and night. So no underserved areas are involved.

24. Except for Cawley's, the other three proposals are virtually indistinguishable. Sandpiper's slight population advantage over SCBC and Englewood is *de minimis.* However, those three applicants are entitled to *slight* preference over Cawley since they serve almost twice as many people over a substantially greater square-kilometer area. However, that preference can't be considered more than slight since there are no underserved areas involved. But see Ultimate Finding 6 *infra.*

25. *Integration of Ownership With Management. SCBC:* SCBC claims 90.2% quantitative integration. In its exhibits it asserted that it would fully integrate its 90.2% voting stockholder into the proposed station's day-to-day operation as General Manager. That claim was rejected as on impermissible variance, and an improper attempt to upgrade its comparative showing (Tr. 72-81; FCC 89M-1246 released April 21, 1989; and FCC 89M-1305 released April 28, 1989 at Footnote 2).

26. So SCBC will be awarded 0% quantitative integration. This means that even if SCBC didn't have a *substantial* and *decisive* diversification demerit against them (*See* Finding 21 *supra.*). They would still be in a precarious comparative position under the Commission's second comparative objective; i.e., furnishing the best practicable service to the public.

27. *Cawley Broadcasting.* Cawley claims 100% quantitative integration. They say they will integrate their 100% stockholder, president, secretary, treasurer, and sole director, Augustine Cawley, into their proposed day-to-day operations. He will work full-time (at least 40 hours per week) as the station's general manager. In that position he will be responsible for all aspects of the station's operations; he will establish and implement all station policies; and he will hire and fire and supervise all station employees, and manage the station overall. All department heads will report directly to Mr. Cawley.

28. Augustine Cawley was born on November 3, 1989. He resides at 11 Norwood Drive, Queensbury, New York, Glens Falls (Tr. 133). He says he will relocate to Englewood, where he will reside and devote his time and attention to serving as general manager of the Englewood station.

29. But what Cawley *says* he will do is totally inconsistent with what he has done in the past. For instance, he resided in Glens Falls in 1986 when he acquired WWBZ(AM), Vineland, New Jersey, and WMJK(AM), Kissimmee, Florida. *See* Findings 13-15 *supra* But he never changed his residence to either Vineland or Kissimmee. He describes himself as a fella that is " . . . just trying to find some place that's warmer." See Finding 17 *supra* But he's never moved to Kissimmee. And when you realize that both Vineland, and Kissimmee have larger populations than Englewood (See Finding 14 *supra.*), serious doubts exist that Augustine Cawley will *permanently* change his permanent residence.

30. Mr. Cawley has about fourteen years of *broadcast experience* (from 1975-1989), principally in the purchase, construction, and sales of broadcast stations (see Findings 15-16 *supra.*). He is a white, non-hispanic male, and therefore entitled to no qualitative comparative enhancements. Since he has never lived in Englewood, he cannot claim *civic participation.*

31. *Englewood Radio Inc.* ERI claims 50% quantitative integration. They say they will integrate 2 of their stockholders into the proposed station's operation; i.e., Sam J. Blum, and Herb Swarzman. However, ERI's opponents have established record evidence that raises serious doubts about their integration commitment.

32. Rather it appears that three long-time real estate operators, businessmen, and developers, Messrs. Blum, Cole, and Swarzman, along with their local attorney, Mr. Barnett, have decided to take a fling into broadcasting. After some discussion, they decided that two of these four entrepreneurs would take care of making sure the enterprise was properly constructed and operated. The two that were selected were Mr. Blum and Mr. Swarzman because their then present economic situation was more flexible than Mr. Cole's and Mr. Barnett's; *i.e.,* they had just finished establishing, and selling two restaurants. So they were free to take on an additional venture.

33. A certain nonchalance and cavalier attitude pervades the ERI integration proposal. For instance, neither Blum nor Swarzman had any meaningful role in preparing ERI's application. It was James Cole that prepared the initial application; he arranged for the engineering and programming exhibits to be prepared; and he prepared the station's budget. While Mr. Blum obtained the initial transmitter site, Mr. Cole handled and arranged for the amended transmitter.

34. While Mr. Swarzman is ostensibly treasurer of ERI, ERI's bookkeeping is handled by one of Mr. Cole's employees, Ann Kilgar. She opened the checking account, has the ERI checkbook, and will maintain it until the station is operating. So essentially James Cole maintains the checkbook and keeps the books for ERI. It was James Cole who decided that ERI would employ auxiliary power.

35. ERI claims that Sam Blum will be the proposed station's full-time (at least 40 hours a week) General Manager and its Sales and Marketing Manager. But Blum says he'll hire a manager for sales and marketing. He says " . . . I would hire a capable party from the area to work with me in sales and marketing and -- you know, everybody likes to have a title. We would maybe call him sales or marketing manager under the guidance and assistance of the general manager" (Tr. 165).

36. Similarly, Mr. Swarzman has indicated that ERI would hire a general manager. But when the fact was called to his attention, Swarzman replied "I don't want to get caught up here in titles . . . " (Tr. 279), and " . . . titles is not the way we work." So one is left with the impression that Blum and Swarzman will loosely integrate themselves into ERI's proposed operation, if at all.

37. Sam Blum's and Herb Swarzman's cavalier attitude even carried over to the hearing itself. Although the hearing date for this proceeding was established back on December 21, 1988 (FCC 88M-4330), Mr. Blum had to be cross-examined by speaker phone from Israel, where he was participating in a previously-arranged tour which he chose not to leave. (Tr. 167). Similarly, the hearing had to be held over another day, because Herb Swarzman was unable to attend the first day because he had another business commitment on the west coast. (Tr. 167, 187).

38. Moreover, neither Blum nor Swarzman will move to Englewood to fulfill their integration commitments. Instead, they will commute from some 90 miles away (about 90-95 minutes each day) on a daily basis.

39. Based on Findings 31-38 *supra*., it would be far too risky to credit ERI's integration proposal. It is inherently impermanent and unreliable. So ERI will be awarded 0% quantitative integration instead of the 50% they seek.

40. *Sandpiper Broadcasting, Inc.* Sandpiper claims 100% quantitative integration. They will integrate both of their voting stockholders into the proposed station's day-to-day operations.

41. First they intend to integrate their President, Treasurer, Director, and 50% voting stockholder, John E. Piper, into the station's day-to-day operations. John Piper will serve full-time (40 hours or more per week) as station manager. In that capacity he will supervise and direct the station's affairs. This will include the station's construction, its operations, and its news and programming.

42. John E. Piper was born on May 26, 1961, born and raised in Michigan. He holds a Bachelor's degree (with distinction) in Business Administration from the University of Michigan. In 1985 he and his wife Patricia *(see infra.)* moved to Sarasota, Florida. There he worked as a mortgage banker at First Florida Bank. Since July 1987 he has been a stockbroker with Dean Witter Reynolds. He will resign from his present employment and move to Englewood, Florida if Sandpiper's application is granted. Mr. Piper is a white, non-hispanic male.

43. Next, Sandpiper intends to integrate their Vice-President, Secretary, Director and 50% voting stockholder, Patricia A. Piper into the station's day-to-day operations. She will serve full-time (40 hours or more per week) as Sales Manager. In that capacity Mrs. Piper will supervise the station's sales staff. She will also serve as the station's personnel manager and will hire, promote, and discharge its employees. She will also serve as the station's EEO officer, and its Community Relations Director.

44. Patricia Piper, a white non-hispanic female, was born in Michigan on June 16, 1959. She was raised in Michigan and studied advertising and psychology at Aplena Community College. In 1985, she and her husband, John *supra*., moved to Sarasota, Florida. If Sandpiper's application is granted, Mrs. Piper will terminate any employment she may have and move to Englewood and establish residence there.

45. Mrs. Piper has *past broadcast experience*. In 1982 and 1983 she was an advertising consultant at WHSR-FM, Alpena, michigan. There she sold advertising time and wrote copy. From 1983-1984, she did the same thing at WLAV-FM, Grand Rapids; and from 1984-1985, she sold advertising time and wrote copy for WLHT-FM, Grand Rapids, Michigan.

46. After she and her husband moved to Florida 1985, she went to work as an account executive for WDUV-FM, Bradenton, Florida. There she sold time and serviced advertising accounts. Two years later, she moved to Storer Cable Television in Sarasota. There she worked for over a year as an account executive. She sold time, developed advertising proposals, and serviced accounts. From January to March, 1989, she sold advertising for *West Coast Woman*, a biweekly South Florida publication.

47. Patricia Piper claims and is entitled to the integration enhancement due a white, non-hispanic female.

48. Sandpiper's opponents have leveled the usual attacks on Sandpiper's integration claim. They argue that that claim lacks permanence, sincerity, and that the permanence of its corporate structure isn't clear.

49. Those attacks will be rejected. They lack evidentiary support. John and Patricia Piper first learned from a local newspaper article that the Englewood FM frequency was available. Together they decided on a two-tier applicant structure. They have fully controlled the preparation and prosecution of their application. They have made all of Sandpiper's business and litigation decisions. John Piper estimated the cost of constructing and operating the station; he opened the corporate checking account; and he obtained reasonable assurance of the availability of each of Sandpiper's proposed transmitter sites.

50. Patricia Piper prepared the EEO program. They jointly prepared and reviewed the application. The two non-voting stockholders, both of whom reside back in Michigan, have not been involved in Sandpiper's affairs, except to make the required capital contributions. *See* Sandpiper Exhibit 1; Tr. 194, 197, 199, 205, 206, 210, 217, 237, and 238). In brief, there is no reason to suspect that Sandpiper's two-tiered corporate structure is a sham. Indeed it appears to be a firm, well-reasoned structure to which Sandpiper's two voting stockholders are permanently committed.

51. *Auxiliary Power*. Each of the four applicants proposes to install auxiliary power facilities.

## ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Four mutually-exclusive applicants remain in the running to operate a new FM station on Channel 290A in Englewood, Florida: (1) Sarasota-Charlotte Broadcasting Corporation (SCBC); (2) Cawley Broadcasting Corporation, Inc. (Cawley); (3) Englewood Radio, Inc. (ERI); and (4) Sandpiper Broadcasting, Inc. (Sandpiper) No basic

qualifying issues were designated or added against any of the four that weren't summarily resolved by Summary Decision. The parties adduced evidence on the only contested issue, the standard comparative issue.

2. In deciding the standard comparative issue, we'll analyze the four applicants under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 395, as modified by subsequent Review Board and Commission decisions. And, as set out in that statement, we'll direct our analysis toward the Commission's two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

3. *Diversification of Mass Media*. Turning to the first Commission objective; we see that three of the four applicants, ERI, Cawley, and Sandpiper hold no attributable broadcast interests. ERI's record is clear, and both Cawley's and Sandpiper's divestment pledges have been accepted. Thus, these three are entitled to a *decisional* and *decisive* diversification advantage over SCBC, who owns an AM facility in the proposed community of license, Englewood, Florida. See Findings 11-21 *supra* Because of its decisional demerit under the diversification criteria, SCBC is eliminated from further consideration, and will not be analyzed further. [34]

4. *The Best Practicable Service*. In deciding which of the three remaining applicants will offer the best practicable service to the public we may have to examine as many as four criterion: (1) whether any applicant or applicants should be preferred because of a superior areas and population proposal; (2) the degree each will integrate their ownership into the day-to-day management of the station (Quantitative Integration); (3) the qualities each integrated owner will bring to that day-to-day management (Qualitative Integration); and (4) whether the degree of quantitative and qualitative integration is enhanced by minority and/or female ownership. Criterion (3)-Qualitative Integration - includes such factors as local residence, participation in civic affairs, past education and business experience, past broadcast experience and auxiliary power.

5. *Criterion 1*: *Comparative Coverage*. Except for Cawley's proposal, ERI's and Sandpiper's coverage proposals are virtually indistinguishable. Ordinarily ERI and Sandpiper would be entitled to a *slight* preference over Cawley since they serve almost twice as many people over a substantially greater square-kilometer area. See Findings 22-24 *supra*

6. But realistically, there is a far more important problem than the slight preference ERI and Sandpiper will obtain. For example, if Cawley is granted, the Commission's objective of getting speedy service to the Englewood community will be thwarted. The chances are 19 out of 20 that if Cawley is granted, his first act will be to seek to amend to a site that serves twice as many people. And that will substantially delay construction, and thwart the Commission's speedy service objective. One thing is certain, Augustine Cawley will not construct a station that only serves half its potential audience. That would cut way back on his profits when he sells the station. So ERI and Sandpiper will be awarded a *moderate* preference over Cawley under the comparative coverage criterion.

7. *Criterion 2*: *Quantitative Integration*. Sandpiper has established its claim to 100% quantitative integration. See Findings 40-50 *supra* And even though his claim is shakey (Findings 13-18 and 27-29 *supra*.), so has Cawley. ERI only claims 50% quantitative integration. See Finding 31 *supra*. So *even if* that 50% claim was credited, they would be eliminated from further comparative consideration. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC 2d 643 (R. Bd. 1983) at 649. But the record demonstrates that ERI isn't even entitled to the 50% quantitative integration they claim. So with 0% quantitative integration, no useful purpose would be served in evaluating ERI further.

8. *Criterion 3*: *Qualitative Integration*. Since both Cawley and Piper are entitled to 100% quantitative integration, we must examine the quality of their claims. Here Piper is entitled to a *substantial* preference over Cawley. Piper has put forward a firm, well-reasoned, and stable integration structure. Cawley's, on the other hand, reeks of impermanence and instability. Cawley's "trafficking" propensities clearly demonstrate that he will not become a *permanent* resident of Englewood; rather the record evidence points to the conclusion that Gus Cawley intends to speculate in the public domain. This isn't the type of integration that leads one to believe that Cawley will offer the best practicable service to the public.

9. Neither the Pipers nor Cawley are *local residents* although both applicants say they will move to Englewood, and establish a *permanent* residence there. There is no reason to doubt John and Patricia Piper's promise on this score. But there is substantial reason to doubt Cawley's. See Findings 13-18, and 28-29 *supra*

10. Neither applicant can claim any advantage for *civic participation* or *auxiliary power*. The Pipers appear to have the edge in *education and business experience*. See Findings 42 and 44 *supra* There isn't a lot to evaluate when it come to *broadcast experience*. Gus Cawley has fourteen years of "trafficking" experience, while Patricia Piper's 6 years of broadcast experience has been almost exclusively in sales. Compare Findings 15-16 and 30 *supra* With Findings 45-46 *supra*.

11. All in all, the quality of Sandpiper's integration claim is substantially superior to Cawley's.

12. *Criterion 4*: *Minority and Female Enhancement*. Here again, Sandpiper's proposal is *clearly* superior to Cawley's. Gus Cawley owns 100% of Cawley's stock. He is a white non-hispanic male. See Finding 30 *supra* Therefore his quantitative and qualitative integration is not enhanced one bit. On the other hand, Sandpiper's quantitative and qualitative integration is enhanced by 50% voting stockholder Patricia Piper's credit for being a white non-hispanic female.

### *Ultimate Conclusions*

13. Under ultimate Issue 2 we must determine, in the light of the evidence adduced under the standard comparative issue, which of the four applications should be granted.

14. Two applicants, Sandpiper and Cawley, stand clearly above SCBC and ERI. SCBC stumbled badly under both of the Commission's comparative objectives. They were handed a decisional comparative demerit under the diversification of mass media objective and they garnered 0% quantitative integration under the best practicable service objective. So they are clearly out of it comparatively.

15. ERI also garnered 0% quantitative integration under the best practicable service objective and was thus eliminated from further consideration.

16. This left just Sandpiper and Cawley. Neither has diversification of mass media problems since both of their divestment pledges have been honored. So the Commission's first primary objective played no part in the outcome of this proceeding.

17. Turning then to the Commission's second objective, the best practicable service to the public, evidence was adduced under four criteria (Conclusions 4-9 *supra.*). Both Sandpiper and Cawley established their claim to 100% quantitative integration. So neither was entitled to a comparative preference under criterion 2. See Conclusions 7 *supra*

18. But on the other three best practicable service criterion, Sandpiper proved to be easily superior. They were entitled to a *moderate* preference under Criterion 1- comparative coverage (Conclusion 5 *supra.*); a *substantial* preference under Criterion 3- qualitative integration (Conclusions 8-11 *supra.*); and a *clear* preference for Patricia Piper's female enhancement under Criterion 4 (Conclusion 12 *supra.*).

19. Thus the ultimate conclusion under designated issue 2 is that Sandpiper Broadcasting, Inc., will be preferred over Cawley Broadcasting Corporation, Inc., because it is Sandpiper that will offer the best practicable service to the public in Englewood, Florida and vicinity.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Sandpiper Broadcasting, Inc.'s application (BPH-870910OG) IS GRANTED; and

The applications of Sarasota-Charlotte Broadcasting Corporation, Inc., (BPH-870908MX), Cawley Broadcasting Corporation, Inc. (BPH-870910MM),and Englewood Radio, Inc., (BPH-870910NS) ARE DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

## FOOTNOTES

[1] In their proposed findings of fact and conclusions of law, the Mass Media Bureau addressed only the comparative aspect of the standard comparative issue. *See* para. 3 *supra*.

[2] See e.g. *Edina Corp. et. al.*, 4 FCC 2d 36 (1966) at pp. 60-61. In the pre-deregulation days: "The Commission's concern with trafficking or, as it has been called "speculation in the public domain" is of long standing and requires no extensive elaboration here. In brief, it is the Commission's stated policy to discourage the activities of promoters or brokers, who "speculate, barter, or trade in licenses . . . to the detriment of the public interest." Of course, an intention to profit from the operation of a facility, rather than from its sale, is as essential to the full development of broadcasting as it is to the development of any other industry . . . "

[3] Note that full comparative findings have been made to the extent possible. It's only further comparative conclusions that aren't needed.

[4] Even if SCBC wasn't eliminated on diversification grounds, it has been awarded 0% quantitative integration. See Findings 25-26 *supra* So its substandard application would be disregarded under the Commission's best practicable service objective.

[5] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 15, 1989**

**FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC**

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not published in the FCC Record (*See* 0.445(a) of the rules).

These decisions are available for public inspection. Periodically, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director decisions are released for information:

Centel Cellular Company - Petition for Reconsideration Held in Abeyance and Included in Lottery on a Contingent Basis - Dismissal of (2) Rural Cellular Lottery Applications due to Defective Fee Payment in Market #'s 567 and 579 (August 11, 1989) Corrected to show Due to Defective Fee Payment instead of Untimely Filed.

Frank Mirgon re Applicants et al - Petition for Reconsideration Denied - Dismissal of 1,223 Rural Cellular Applications in Various RSA Markets due to "NSF" Checks (September 6, 1989)

Pacific Nationwide Cellular - Petition for Reconsideration of Managing Director's Decision of August 23, 1989 Held in Abeyance and Included in Lottery on a Contingent Basis (September 19, 1989)

U S West NewVector Group, Inc. - Request for Determination, Waiver and Refund of Filing Fees Granted - Assignment of Various Mobile Services Licenses (September 22, 1989)

Dial Page, Ltd. - Request for Determination, Waiver and Refund Fees Granted - Assignment of License of Public Mobile Service and Point-to-Point Microwave License and Transfer of Control (September 27, 1989)

WJCT, Inc. - Request for Determination, Waiver and Request for Refund of $1600 Filing Fee Granted - MMDS Station in Jacksonville, Florida (October 11, 1989)

Great Trails Broadcasting Corp. - Petition for Waiver and Refund of $200 Filing Fee Granted - License Application for WXGT-FM at Columbus, OH (October 11, 1989)

Barnards Delaware City Marina, Inc./Capt Zeke's Launch Service, Inc. - Request for Waiver of Filing Fee Denied - Application for Land Based Marine Radio Station (October 11, 1989)

Mike Conner d/b/a Conner Broadcasting - Request for Refund of $6000 Hearing Fee Granted - Application for New FM Station at New Bern, NC (October 11, 1989), MM Docket No. 89-310

Morris Communications, Inc. - Petition for Reconsideration Dismissed as Moot - Dismissal of Rural Cellular Lottery Application due to "NSF" Check (October 19, 1989)

Abacus Broadcasting Corp. - Request for Refund Denied - Assignment of License Application for KJQN(AM) at Ogden, UT (October 19, 1989)

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER MICKEY WILLIAMS, ACTING CHIEF, FEE SECTION PH. 632-0241

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-485**

In the Matter of

Amendment of Section 73.202(b), RM-6942
Table of Allotments,
FM Broadcast Stations.
(Creston, Iowa)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 19, 1989; Released: November 15, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by G.O. Radio, Ltd. (petitioner) requesting the substitution of Channel 267C3 for Channel 269A at Creston, Iowa, and the modification of its license for Station KITR-FM to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 267C3 can be allotted to Creston in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KITR-FM to specify operation on Channel 267C3. Pursuant to Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Creston or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 267C3 for Channel 269A at Creston, Iowa, since it could enable Station KITR-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Creston, Iowa | 269A | 267C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Glenn R. Olson, President
G.O. Radio, Ltd.
P.O. Box 550
Webster City, Iowa 50595
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

### APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 41-05-41 and West Longitude 94-22-30.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-495**

In the Matter of

Amendment of Section 73.202(b), RM-6940
Table of Allotments,
FM Broadcast Stations.
(Culebra, Puerto Rico)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 24, 1989; Released: November 15, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Maria del Carmen Aviles (petitioner) requesting the allotment of Channel 293A to Culebra, Puerto Rico, as its first local FM service. Petitioner states that she will apply for the channel, if allotted. Channel 293A can be allotted to Culebra in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Culebra is not listed in the U.S. Census. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Culebra is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See , e. g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 293A to Culebra, Puerto Rico, as its first local FM service, contingent upon a finding that Culebra is a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Culebra, Puerto Rico | -- | 293A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Maria del Carmen Aviles
Apt. 631
Fajardo, Puerto Rico 00648
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 18-18-18 and West Longitude 65-18-06.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-496**

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Georgetown and Myrtle Beach, South Carolina) RM-6971

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 24, 1989; Released: November 15, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Coastline Communications of Carolina, Inc. (petitioner), licensee of FM Station WBPR, Channel 249C2, Georgetown, South Carolina, requesting the reallotment of its channel to Myrtle Beach, South Carolina, and the modification of its license accordingly.

2. Petitioner states that Georgetown has a population of 10,740 persons as of July 1, 1986, compared with a Myrtle Beach population of 27,980 for the same time period. Likewise, petitioner notes that the population of Georgetown County is 47,200 as compared to Horry County's 130,700, of which Myrtle Beach is a part. It goes on to submit that Georgetown currently receives local service from three FM and two AM stations while Myrtle Beach is locally served by only two FM and two AM stations. Therefore, it believes that the public interest would be served by providing the larger community of Myrtle Beach with an additional local outlet. Petitioner states that Myrtle Beach is wholly within the existing 70 dBu contour of Station WBPR and thus it is not requesting a change in its transmitter site or its class of channel.[1]

3. We believe the public interest would be served by proposing to reallocate Channel 249C2 from Georgetown, South Carolina, to Myrtle Beach, South Carolina, and modify the license of Station WBPR accordingly, since it could provide the larger community with an additional local service without depriving Georgetown of its sole local broadcast service. As requested, we also propose to modify petitioner's license for Station WBPR accordingly. In accordance with Section 1.420(i), we will not accept competing expressions of interest in use of the channel at Myrtle Beach. *See , Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989).

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| City | Channel No. Present | Proposed |
|---|---|---|
| Georgetown, South Carolina | 229A, 249C2, 293C2 | 229A, 289A,[2] 293C2 |
| Myrtle Beach, South Carolina | 221A, 269C2 | 221C2,[3] 249C2, 269C2 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Christine D. McLaughlin, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The coordinates for this allotment are North Latitude 33-35-27 and West Longitude 79-02-53.

[2] The Commission has pending before it a request filed by RJM Broadcasting seeking the allotment of Channel 289A to Georgetown (RM-6836).

[3] The Commission has proposed the substitution of Channel 221C2 for Channel 221A at Myrtle Beach, at the request of Myrtle Beach Broadcasting Limited Partnership. *See* 3 FCC Rcd 7269 (1988).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-497**

In the Matter of

Amendment of Section 73.202(b), RM-6877
Table of Allotments,
FM Broadcast Stations.
(Apalachicola, Florida)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 24, 1989; Released: November 15, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Richard L. Plessinger, Sr. (petitioner) requesting the substitution of Channel 293C1 for Channel 265A at Apalachicola, Florida, and modification of his license for Station WOYS(FM) to specify the higher powered channel. Channel 293C1 can be allotted to Apalachicola in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.7 kilometers (6.1 miles) east at WOYS's current transmitter site.[1]

2. As requested, we shall propose to modify petitioner's license for Station WOYS(FM) to specify operation on Channel 293C1. In accordance with Section 1.420 of the Commission's Rules, Station WOYS(FM)'s license may not be modified herein to specify non-adjacent Channel 293C1 if a competing expression of interest is received unless there is an additional equivalent class channel available for allotment.

3. We believe the public interest would be served by proposing the substitution of Channel 293C1 for Channel 265A at Apalachicola, since it could enable Station WOYS(FM) to expand its coverage area. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Apalachicola, Florida | 265A, 288A | 288A, 293C1 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Kenneth E. Hardman
1200 29th Street, N.W.
Washington, D.C. 20007
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 29-43-57 and West Longitude 84-53-24.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-498**

In the Matter of

Amendment of Section 73.202(b), RM-6916
Table of Allotments,
FM Broadcast Stations.
(Bethany Beach, Delaware)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 24, 1989; Released: November 15, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Alfred R. Campagnone (petitioner), requesting the allotment of Channel 278A to Bethany Beach, Delaware, as that community's second FM service.

2. Channel 278A can be allotted to Bethany Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 278A to Bethany Beach, Delaware, since it could provide the community with its second FM service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Bethany Beach, Delaware | – | 278A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Alfred R. Campagnone, G.M.
c/o WNRK (AM) Radio Station
496 Walther Road
Newark, Delaware 19713

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 38-32-22 and West Longitude 75-03-20.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-499**

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Sparta and Saint Robert, Missouri) RM-6928

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 24, 1989; Released: November 15, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by James L. Gardner (petitioner), requesting the substitution of FM Channel 243C2 for Channel 243A at Sparta, Missouri. Petitioner also requests modification of his license for Station KLTQ, to specify operation on the higher class channel.

2. Channel 243C2 can be allotted to Sparta, Missouri, in compliance with the minimum distance separation requirements at the petitioner's proposed site.[1] To accommodate the new channel at Sparta, it would be necessary to delete Channel 243A at Saint Robert, Missouri. One application is on file for the channel at Saint Robert. Petitioner has proposed the substitution of Channel 255A at Saint Robert. Channel 255A can be allotted to Saint Robert in compliance with the spacing requirements at the city reference coordinates.[2] The applicant for Channel 243A at Saint Robert would be permitted to specify the new class A channel at a non-short spaced site and retain its cut-off protection, since the channels are of an equivalent class.

3. As for the requested upgrade at Sparta, we shall propose to modify the license of Station KLTQ to specify operation on Channel 243C2, in accordance with Section 1.420(g) of the Commissions Rules.

4. In order to provide a wide coverage area station for Sparta, Missouri, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Saint Robert, Missouri | 243A | 255A |
| Sparta, Missouri | 243A | 243C2 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Colby M. May
May & Dunne, Chartered
1000 Thomas Jefferson Street, N.W.
Suite 520
Washington, D.C. 20007

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, Return Receipt Requested, a copy of this Order to the following:

Neil A. Rones
Luann C. Dalh
1268 Mautenne
St. Louis, Missouri 63021

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The coordinates for Channel 243C2 are 36-56-23 and 93-17-15.

[2] The coordinates for Channel 255A at Saint Robert are 37-49-41 and 92-10-39.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-421**

In re Applications of

| | |
|---|---|
| MID-OHIO/CAPITOL COMMUNICATIONS LIMITED PARTNERSHIP | File No. BPH-870515MK |
| SCIOTO BROADCASTERS, LIMITED PARTNERSHIP | File No. BPH-870514MU |
| MID-OHIO RADIO LIMITED | File No. BPH-870515NM |
| CLEAR CHANNEL COMMUNICATIONS, INC. | File No. BPH-870515NN |
| HORACE E. PERKINS | File No. BPH-870515NP |
| MCCALL BROADCASTING, INC. | File No. BPH-870515NU |

For Construction Permit for a New FM station on Channel 298A in Columbus, Ohio

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 6, 1989; Released: November 16, 1989**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On August 30, 1989, McCall Broadcasting, Inc. (McCall) filed an Appeal, pursuant to 47 CFR 1.301(a)(1), from an order of presiding Administrative Law Judge Edward J. Kuhlmann (ALJ) dismissing its application for a construction permit for a new FM station at Columbus, Ohio. *Memorandum Opinion and Order (Dismissal Order)*, FCC 89M-2132, released August 23, 1989. Two competing applicants, Scioto Broadcasters, Limited Partnership (Scioto) and Horace E. Perkins (Perkins) have opposed the appeal. The Board will deny McCall's Appeal for the reasons set out below.

**BACKGROUND**

2. By *Memorandum Opinion and Order*, FCC 89M-1587, released June 5, 1989, the ALJ added financial and misrepresentation issues against McCall. This order was predicated on Scioto's showing that although McCall's financial certification was based on a putative $500,000 loan, which required the personal guarantee of Vernon Merritt, Jr., its purported non-voting 80% equity shareholder, Merritt was barred by a court order from guaranteeing any such loan. Scioto then sought discovery relevant to these issues, filing a motion for production of documents on June 9, 1989, and noticing Merritt for deposition. However, on July 10, McCall filed a Motion for Summary Decision on the financial and misrepresentation issues, and it opposed the taking of Merritt's deposition. By *Memorandum Opinion and Order*, FCC 89M-1859, released July 12, 1989, the ALJ denied McCall's motion, ordered that Merritt be deposed, and set July 21, 1989 as the date for production of documents.

3. McCall did not comply with the July 12 order; instead, on July 21, 1989 (the document production date), it sought "reconsideration" of the order. The ALJ denied this request, and he extended the document production date to August 4, 1989, expressly warning McCall that failure to comply would result in its "forfeit[ing] its opportunity to establish its financial qualifications." *Memorandum Opinion and Order*, FCC 89M-2011, released July 31, 1989, at para. 2. The ALJ there observed that "McCall's rationale for establishing the validity of its [financial] certification changes with each new pleading [and that t]he documents requested by Scioto may lead to relevant evidence." Nevertheless, McCall failed to produce the documents on the August 4 due date. Instead, on August 4, its counsel wrote to the ALJ and declared that "McCall simply refused to provide any balance sheet for Mr. Merritt [because] McCall believed [the] balance sheet was irrelevant since it did not need his assets to finance the proposal." *Dismissal Order*, at para. 3.

4. Next, on August 14, Scioto filed a Motion to Dismiss McCall's application, and Perkins filed a similar motion three days later. The ALJ granted these motions, observing that while McCall had earlier argued that Merritt's loan "guarantee would take effect when Merritt's assets were no longer encumbered," it has changed its position, apparently "in bad faith merely to avoid discovery," to now urge that Merritt's finances are simply "not relevant." *Id.*, para. 4. McCall also failed to file its written testimony which was due on August 14; rather, it waited until August 18 to request suspension of procedural dates until the motion to dismiss was ruled upon. *Id.*, para. 5. Finally, McCall failed to produce other documents unrelated to Merritt's balance sheet, and Merritt twice failed to appear for scheduled depositions, without McCall lodging any objection to his appearance or seeking a protective order. After noting all these defaults, the ALJ observed that "McCall's general approach . . . has been to participate only to the extent it wanted to do so and withhold information it believed was against its interest." *Id.* Thus, the ALJ dismissed McCall's application because: (1) the other parties have been prejudiced by McCall's unilateral foreclosure of their opportunity to adduce evidence through discovery; and (2) allowing McCall to remain in the proceeding, after its two months of equivocation and eventual "flat out" refusal to submit to discovery, would be wasteful of the Commission's limited resources. *Id.*, para. 6.

**DISCUSSION**

5. We deny McCall's appeal because the ALJ's *Dismissal Order* conforms fully with court and Commission precedent governing dismissals of applications in comparative hearings. Recently, in upholding the authority of an ALJ to dismiss an applicant, the court enumerated the factors it considers:

> [T]he applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

*Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988). The Board has applied these standards in recent cases, *see, e. g., Carroll, Carroll & Rowland*, 4 FCC Rcd 7149, 7151-7152 (Rev. Bd. 1989); *V. O. B. Inc.*, 4 FCC Rcd 6753, 6754-6755 (Rev. Bd. 1989); *Mark A. Perry*, 4 FCC Rcd 6500, 6502-6503 (Rev. Bd. 1989).

6. Here, McCall's sole justification for its pattern of noncompliance is its claim that the documents sought, and Merritt's personal financial condition, are irrelevant to the case. However, it has never claimed that the information was privileged, nor did McCall request the ALJ to issue a protective order to limit the scope of discovery, or to require that Merritt's deposition be sealed. *See* 47 CFR §1.313. Discovery is generally permitted where it likely will lead to the adduction of evidence relevant to the specified hearing issues. *See* 47 CFR §1.311(b); *Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *see generally Metroplex Communications, Inc.*, FCC 89R-67, adopted October 26, 1989 (Rev. Bd.), at n. 11. And, the Commission routinely entrusts the determination of the scope of such discovery in comparative hearings to the broad discretion of the ALJ. *See* 47 CFR §§1.243, 1.311(d); *Vue-Metrics, Inc.*, 69 FCC 2d 1049, 1058-1059 (1978); *Florida-Georgia Television Co., Inc.*, 15 RR 2d 1028, 1029 (1969); *see also Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), *appeal dismissed mem.subnom.Punta Ybel Communications Ltd. v. FCC*, No. 86-1670 (D.C. Cir. 1988); *V.O.B.; Mark A. Perry*. Because McCall failed to timely challenge the ALJ's June and July rulings regarding financial and misrepresentation issues specified against it, its belated raising of those matters cannot excuse its willful and repeated failures to abide by those orders.

7. Moreover, as the ALJ found, the other parties have been seriously prejudiced by McCall's foreclosure of their opportunity for discovery. No administrative system could function efficiently if applicants were permitted to pick and choose which prehearing orders they will obey. *See Carroll, Carroll & Rowland*, 4 FCC Rcd at 7151-7152.

8. ACCORDINGLY, IT IS ORDERED, That the appeal filed August 30, 1989 by McCall Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-382**

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit
Secaucus, New Jersey

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 7, 1989; Released: November 16, 1989**

By the Review Board: MARINO (CHAIRMAN), BLUMENTHAL, ESBENSEN

1. The Review Board now has before it for consideration an appeal filed September 12, 1989 by Whitely Communications (Whitely) from presiding judge Sippel's *Memorandum Opinion and Order*, FCC 89M-2206, released September 6, 1989 (*Dismissal Order*), dismissing Whitely's application with prejudice in this proceeding. Oppositions to the appeal were filed September 22, 1989 by WWOR-TV, Inc. and the Chief, Mass Media Bureau; Whitely filed a reply on September 28, 1989. [1]

2. The presiding judge's *Dismissal Order* focused primarily on three "offending acts on Whitely's part" (*Dismissal Order*, at para. 14) which were: (1) Whitely's failure to appear at a prehearing conference on September 9, 1988 after unsuccessful attempts by the judge's staff to reach him by telephone; (2) Whitely's failure to attend a September 28, 1988 prehearing conference as instructed by the judge; and (3) Whitely's failure to comply with the judge's *Order*, FCC 88M-4014, released November 23, 1988, directing him to produce documents on December 19, 1988 relating to financial qualifications and false financial certification issues added against Whitely. In further support of dismissal, the judge cited other incidents which included Whitely's failure to respond to correspondence and to be available for telephone calls from opposing counsel as well as Commission staff; Whitely's disregard of the judge's *Memorandum Opinion and Order*, FCC 88M- 2982, released September 13, 1988, at 3, n.4, directing him to mail an opposition pleading to a motion to enlarge issues by air express; Whitely's failure to respond to Federal Express correspondence relating to a joint request for production of documents; Whitely's untimely filing of a motion to strike and to dismiss directed at WWOR-TV, which was denied by the judge after he admonished Whitely for his use of intemperate language (*Memorandum Opinion and Order*, FCC 88M-3813, released November 9, 1988); Whitely's untimely filing, even after an extension of time had been granted, of a motion for leave to appeal the judge's *Order* adding financial issues against him; Whitely's failure to timely serve WWOR-TV with a copy of his appeal directed to the Review Board on November 30, 1988; and Whitely's recent filings on August 4 and 14, 1989 of unauthorized pleadings to further stay the proceeding, after the Commission had acted on July 27, 1989 to affirm the ALJ's ruling on his qualifications to remain in the case as presiding officer and after the ALJ had lifted the stay he imposed on March 9, 1989 (*Order*, FCC 89M-2030, released August 2, 1989). [2] Based on the foregoing, the ALJ concluded that the record established repeated deficiencies in Whitely's prosecution of his application that were sufficient to warrant dismissal of the application.

3. In his appeal, Whitely argues that the dismissal of his application reflects continuing anti-Whitely bias on the ALJ's part. Specifically regarding the September 9, 1988 prehearing conference he did not attend, Whitely asserts the meeting was called on only two days' notice and conflicted with a pressing personal obligation. Whitely further states that his failure to attend a second prehearing conference on September 28, 1988 was the result of a scheduling error and not a purposeful disregard of the judge's rulings. As for his failure to produce certain documents for discovery, Whitely contends that he did respond to another documents request. Whitely also submits that he appealed addition of the financial issues, that were the basis for the contested documents request, to the Board and the Commission, and sought a stay of the proceeding during the pendency of his appeals. It is also argued by Whitely that the litany of other failings cited by the ALJ is further evidence of bias because it is based on allegations submitted by the renewal applicant, WWOR-TV. In this regard, Whitely notes that whereas the ALJ has now acted to dismiss Whitely, he has not yet acted on a motion filed by Whitely to dismiss the WWOR-TV application, and that the Mass Media Bureau has added to the prejudice against Whitely by urging the ALJ to act on Whitely's dismissal but making no similar request regarding WWOR-TV. Whitely concludes that his application should be reinstated but that, in any event, the Board should wait to act on Whitely's appeal until it receives an appeal from the ALJ's eventual ruling on Whitely's motion to dismiss WWOR-TV's application.

4. We shall affirm the ALJ's dismissal of Whitely's application. This case is but the latest in a spate of recent appeals from rulings by hearing judges dismissing applications for failure to prosecute. *See Maricopa County Community College District*, FCC 89R-65, released October 27, 1989; *Carroll, Carroll & Rowland*, 4 FCC Rcd 7149 (Rev. Bd. 1989); *V. O. B. Inc.*, 4 FCC Rcd 6753 (Rev. Bd. 1989); *Mark A. Perry*, 4 FCC Rcd 6500 (Rev. Bd. 1989); *Albert E. Gary*, 4 FCC Rcd 4112 (Rev. Bd. 1989). In each of these

cases, applicants were cited for failing to comply with discovery and/or other prehearing orders of the presiding ALJ. It is by now well-settled that "prosecution of an application means timely compliance with procedural and substantive rules, including ALJs' orders." *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986); *Vue - Metrics, Inc.*, 69 FCC 2d 1049, 1058 (1978). Indeed, applicants have been dismissed on the identical grounds highlighted by the ALJ in this case and, thus, Whitely's dismissal here has direct precedential support. *See Warren Price Communications, Inc.*, 4 FCC Rcd 1992 (1989) (failure to attend prehearing conference); *Vue - Metrics, supra* (prosecution includes "production of discoverable documents when so ordered by the presiding officer"); *accord V. O. B. Inc., supra*. Nevertheless, bearing in mind the off-cited language of the Court of Appeals in *Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1998), that in reviewing the dismissal of an applicant from a comparative hearing, among the factors to be weighed is "the applicant's proffered justification for its failure to comply with the presiding officer's order," we now turn to consideration of Whitely's explanations for his conduct. [3]

5. Specifically, as to Whitely's failure to attend the September 9, 1988 prehearing conference, the ALJ noted that because the conference was called on short notice and Whitely was unable to be reached, failure to attend in such circumstances would not ordinarily in and of itself lead to dismisaal. *Dismissal Order*, at para. 14. However, Whitely aggravated the situation when he told the judge that even had he received notice, he "would likely have chosen not to attend in any event since the meeting as called, did not deal with any matters affecting Whitely." *Id.* at para. 9. This stance was inappropriate because, to the contrary, the conference resulted in a ruling by the ALJ addressing fundamental ground rules for discovery affecting all parties including Whitely. *See Order*, FCC 88M-2928, released September 13, 1988. As to his failure to attend a second prehearing conference on September 28, 1988, of which he did have notice, Whitely refers only to a "scheduling error." The ALJ, however, considered this conference to be the most important one because it is formally required under 47 C.F.R. 1.248(a), and we agree that Whitely has offered a weak excuse for his non-attendance, which only served to compound his previous failure and left the clear impression that Whitely was picking and choosing the procedures he would follow. As the ALJ noted, "the disruption to other parties caused by missing these conferences is shown by the inability to have Whitely focus on joint discovery procedures and the uncertainty created as to just when and on what terms Whitely intends to participate in the hearing process." *Dismissal Order*, at para. 15. *See Comuni - Centre, supra*, 856 F.2d at 1554 ("the prejudice suffered by other parties" is a factor to be weighed in considering dismissal). [4]

6. The most serious single instance of non-prosecution cited by the ALJ was Whitely's failure to produce documents as ordered on December 19, 1988. First, we dismiss as irrelevant Whitely's contention that he complied with an earlier documents request; that request dealt with the standard comparative issue whereas the documents in dispute pertain to the basic qualifying financial and certification misrepresentation issues added against Whitely. *See Dismissal Order*, n.4. As to Whitely's claim that his appeal of the ALJ's enlargement order stayed the production schedule, we point out, to begin with, that Whitely's appeal was unauthorized. [5] The ALJ expressly denied Whitely permission to appeal, *see Memorandum Opinion and Order*, FCC 88M-3862, released November 15, 1988, and the Board thereafter denied Whitely's request to accept an appeal of the ALJ's issue enlargement order and for a stay. *WWOR - TV, Inc.*, 3 FCC Rcd 7211 (Rev. Bd. 1988). Thereupon, Whitely asked the Commission to entertain his appeal of the ALJ's action adding the hearing issues. The Commission rejected Whitely's request for essentially the same reasons set forth by the Board; that is, Whitely had not made the requisite showing that there had been a flagrant abuse of discretion by the ALJ that would justify acceptance of the appeal. *WWOR - TV, Inc.*, 4 FCC Rcd 6155, 6156 (1989). Furthermore, in this regard, we agree with the ALJ that there is no provision in the Commission's rules, nor any other authority cited by Whitely, which would support his novel assumption that the ALJ's ruling ordering document production was automatically stayed simply because Whitely filed an unauthorized appeal from the underlying enlargement order. Obviously, acceptance of Whitely's position would run counter to the Commission's rules governing appeals of interlocutory rulings which are designed to insure orderly procedure and to avoid the disruption which would occur if proceedings were interrupted or stayed every time a party was dissatisfied with an ALJ's ruling on an interlocutory matter, and sought relief from the Board or the Commission. *See* 47 C.F.R. 1.301; [6] *WWOR - TV, Inc., supra*, 4 FCC Rcd at 6156.

7. Finally, we disagree with Whitely's contention that the ALJ's rulings were the result of bias against the applicant. The Commission, in turning down Whitely's request to disqualify the ALJ, has already rejected this claim. *WWOR - TV, Inc., supra*, 4 FCC Rcd at 6155. As set forth in detail above, we have reviewed the actions of the judge complained of herein, and find, as the Commission did, that the ALJ dealt with them on the merits and in a fair manner. Moreover, we agree with the ALJ that the additional delicts enumerated herein at para. 2, *supra*, which include untimely filing of a number of pleadings, failure to observe the ALJ's instructions with regard to mailing, and failure to respond to correspondence, are further evidence of dilatory and non-compliant behavior on Whitely's part which lend support to dismissal of his application. In short, the dismissal here was the result of a series of deficiencies and manifestations of non-prosecution by Whitely, and was well within the ALJ's broad discretion in regulating the course of the hearing. *See Comuni - Centre Broadcasting, Inc. v. FCC, supra*, 856 F.2d at 1555; *Hillebrand Broadcasting, Inc., supra*, 1 FCC Rcd at 419. [7]

8. ACCORDINGLY, IT IS ORDERED, That the appeal filed September 12, 1989 by Whitely Communications IS DENIED, and that the reply to opposition to appeal filed September 28, 1989 by Whitely Communications IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

## FOOTNOTES

[1] Whitely's reply pleading was not requested by the Board and is therefore unauthorized and will be dismissed without consideration. *See* 47 C.F.R. 1.301(c)(7).

[2] The judge had suspended the hearing in accordance with 47 C.F.R. 1.245(b)(4), after Whitely filed exceptions to the judge's denial of Whitely's request that the judge disqualify himself in this proceeding.

[3] Because Whitely is represented in this proceeding by its principal, William L. Whitely, there is no occasion to parse the degree of client involvement in the delicts of record. *See Maricopa County, supra, at. n.2 (citing Mark A. Perry, supra* (separate statement)).

[4] After this incident, Whitely was admonished by the presiding judge of the consequences of continued non-prosecution of his application. *Dismissal Order, supra,* at para. 6.

[5] It is also noteworthy that Whitely offered no explanation for his failure to produce the documents on the due date and did not attempt to obtain a stay from the presiding judge.

[6] Cf. 47 C.F.R. 1.301(b) which provides that: "If the presiding officer allows or disallows the appeal, his ruling is final."

[7] No useful purpose would be served by delaying today's action, as requested by Whitely, until such time as appeals may be received from the judge's ruling on Whitely's motion to dismiss WWOR-TV's application. In fact, contrary to Whitely's claim, the judge did rule on Whitely 's motion on September 6, 1988 *(Memorandum Opinion and Order,* FCC 88M-2225), contemporaneously with his ruling dismissing Whitely's application, thus negating the inference of prejudicial treatment Whitely seeks to draw. *See* WWOR-TV Opposition to Appeal, at. p.5.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CONNECTICUT OFFICE OF CONSUMER COUNSEL,[1] JAMES F. MEEHAN, CONSUMER COUNSEL,
CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, PETER G. BOUCHER, CHAIRMAN OF THE DEPARTMENT OF PUBLIC UTILITY CONTROL, AND
JOSEPH I. LIEBERMAN, ATTORNEY GENERAL, STATE OF CONNECTICUT,

Complainants,

v. File No. E-88-061

AT&T COMMUNICATIONS,

Defendant.

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 2, 1989; Released: November 16, 1989**

By the Commission:

1. On March 18, 1988, the above-listed complainants ("complainants" or "COCC") filed a complaint pursuant to 47 U.S.C. § 208 against AT&T Communications (AT&T) for the imposition of a gross receipts tax surcharge on interstate long distance calls originating in Connecticut. The surcharge compensates AT&T for a tax on interstate communications which it pays to the State of Connecticut. Complainants allege that this surcharge discriminates against Connecticut customers. Complainants request, *inter alia*, that AT&T be prohibited from imposing a gross receipts tax surcharge (GRTS) on Connecticut customers and that AT&T be ordered to refund, with interest, the GRTS collected from Connecticut customers. For the reasons discussed below, we deny the complaint.

## I. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. In March 1986 AT&T filed a tariff amendment with this Commission to "establish a tariff provision to flow through any utility or telecommunications taxes imposed on AT&T Communications' interstate gross receipts to customers in the jurisdiction imposing the tax." Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2, Transmittal No. 562, effective April 24, 1986. The original gross receipts tax surcharge was imposed on customers in Florida. Subsequently AT&T filed Transmittal No. 604, modified by Transmittal No. 628, which, *inter alia*, extended the gross receipts tax flow through to eight additional states, including Connecticut.[2] The Common Carrier Bureau denied petitions for suspension or rejection and the tariff took effect. *AT & T Communications Tariff F. C. C. Nos. 1 and 2*, Transmittal Nos. 604 and 628, Mimeo No. 4868 (released May 30, 1986) (*May 30 AT & T Order*). The Commission affirmed the Bureau ruling. 2 FCC Rcd 548 (1987) (*Review Order*). Petitions for review filed in the First and Second Circuits of the United States Court of Appeals were consolidated in the First Circuit Court of Appeals. These petitions were dismissed on September 14, 1987, on the grounds that action on a motion to suspend a tariff was not a final judgment and thus not subject to review by the Court of Appeals. *Maine Public Advocate v. FCC*, 828 F.2d 68 (1st Cir. 1987). In May and November 1987 AT&T again filed tariff revisions affecting the GRTS on calls originating in Connecticut. Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 604, filed May 15, 1987, and Transmittal No. 628, filed November 17, 1987.

3. COCC argues that the gross receipts tax surcharge is unjust and unreasonable under 47 U.S.C. § 201(b) and also violates 47 U.S.C § 202(a) by subjecting Connecticut customers to undue and unreasonable discrimination, disadvantage, and prejudice. It maintains that the GRTS imposes discriminatory prices for Connecticut customers for "like" services. [3] According to COCC this discrimination, disadvantage and prejudice arises from various factors. First, it alleges that AT&T's cost of providing service is lower in Connecticut than the national average. It represents, however, that Connecticut customers must not only pay the higher average national rate, but in addition the GRTS. Complainants conclude that this amounts to discriminatory rates for like services received by Connecticut customers from AT&T compared with customers in other states. Second, COCC attacks AT&T's practice of "flowing through" one cost of service, namely gross receipts taxes, while pooling other costs, such as corporate or property taxes. Complainants contend that flowing through selected tax cost items without considering low cost factors or call volumes allows AT&T to earn an excessive rate of return in Connecticut. Third, COCC maintains that AT&T's tariff permits it effectively to deaverage rates for selective costs, "thus creating geographical deaveraging in violation of the Federal Communications Act." *Id.* at 6.

4. Specifically, COCC asserts that once it is determined that the service being provided under the tariff is a "like" service, the burden of justifying any discrimination is upon the carrier. Moreover, it contends that a cost of service analysis must be the basis for determining if rates are unjustly discriminatory. In this regard, it contends that neither requiring customers in a low cost state to pay higher than average costs nor permitting AT&T to "arbitrarily" flow through gross receipts taxes while pooling all other costs is defensible on a cost-based analysis. Complainants cite *ITT World Communications*, 30 FCC 2d 101 (1970), to support their argument that the Commission recognizes two standards under which discriminatory treatment is not considered to be unlawful or unreasonable -- competitive necessity and differences in the cost of providing the service. It dismisses both of these as possible justifications for the GRTS. Despite advancing this argument, COCC indicates that the Commission has recognized a third exception -- public policy concerns.[4] COCC argues, however, that this exception is not without limitation. Anticipating that AT&T would contend that its GRTS is justified by policy concerns, COCC states that

"AT&T puts great stock in its claims that it need not pay to Connecticut a gross receipts tax because such a tax targets a particular industry, one not represented as a "constituent" of the taxing legislature." Initial Brief at 35. According to COCC, AT&T implies by this argument that there must be a link between the taxed party and the state. COCC asserts that there is such a link, and that the taxation of AT&T, and not of its customers, is a proper exercise of the taxation powers of the State of Connecticut. It maintains that the GRTS enables AT&T to bypass its responsibility to Connecticut to compensate the state for services received.

5. Finally, COCC argues that even if the gross receipts tax surcharge is permissible under the Communications Act, it is calculated incorrectly. The gross receipts tax surcharge imposed by Connecticut is only 6.5 percent. Nevertheless, it states, AT&T's surcharge has been 7.33 percent since January 1, 1988.[5] According to COCC, AT&T explains the discrepancy by a need to offset "the 9 percent utility gross receipts tax imposed by Connecticut on the local exchange carrier's gross receipts, which AT&T pays through interstate switched access charge[s] . . . ." Initial Brief at 41, quoting AT&T's Answer at 4. COCC maintains that this is an arbitrary and improper overcharge since the Connecticut legislation allows for a deduction of the access charges AT&T pays to local exchange carriers in Connecticut. Therefore, complainants assert, to "raise the amount of its gross receipts tax surcharge in Connecticut to "offset" the gross receipts taxes paid by the LECS and allegedly passed on to AT&T through the LEC access charges, unjustly allows AT&T to collect for taxes which Connecticut, by statute, deducts from AT&T's tax liability." Initial Brief at 43. COCC alleges that AT&T receives a double benefit by obtaining the deduction according to the statute and still charging the customers a surcharge calculated as if the deduction had not been taken. Further, COCC claims that the GRTS is incorrectly calculated because AT&T collects the surcharge from the customers on a monthly basis while it is only required to pay the state on a quarterly basis. Thus, it concludes, the surcharge fails to take into account the time value of money.

6. In its opposition, AT&T argues that its gross receipts tax surcharge is "revenue neutral."[6] It explains that by "flowing through" the utility gross receipts tax that Connecticut and only a few other states impose on interstate telecommunications, AT&T recovers state taxes on interstate gross receipts directly from customers in the state imposing the tax rather than by including them in its averaged national rates. It maintains that this eliminates incentives for states to target telecommunications carriers for special tax burdens which would artificially raise the costs of interstate telecommunications. In the absence of a GRTS, according to AT&T, the state imposing the tax would receive the benefits of the tax, but would export most of the burdens of the tax to customers in other states.

7. AT&T argues that the GRTS is just and reasonable. It maintains that it is irrelevant whether Connecticut is a high-cost or low-cost state (nevertheless, it contends that Connecticut is a high-cost, rather than a low- cost, state). It dismisses COCC's contentions that Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a), require that rates be based exclusively on costs. As evidence that Section 202(a) allows the Commission to consider other factors than cost in determining if rates are "just and reasonable," AT&T points out that it is required to charge the same rates for low- and high-cost routes. It maintains that different rates for like services are "reasonable" under Section 202(a) if there is "a neutral, rational basis underlying apparently disparate charges"[7] or "if they promote the "national economic and social polic[ies]" underlying the Communications Act."[8] AT&T maintains that its gross receipts tax "flow-through tariff epitomized the 'neutral, rational' measures that cannot violate Section 202(a) and that, indeed, promote overriding Commission policies." Opposition at 9.

8. AT&T maintains that contrary to COCC's allegations, it is reasonable to treat gross receipts taxes differently than other expenses. First, gross receipts taxes are unique in that they provide states with an incentive to enact such taxes, thereby exporting their tax burdens. It maintains that no other cost of service provides such incentives.[9] By contrast, states AT&T, the taxes which are included in the nationally averaged rates are taxes of general applicability, *i. e.*, taxes that are imposed on all businesses or individuals within a state. Because only a small portion of these taxes is reflected in the nationally averaged rates, the burden of these taxes is borne principally by the residents of the state which imposed them. Likewise, the amount of other costs which are included in nationally averaged rates is a function of matters outside the control of a single state, such as the age of the plant and the terrain. There is no incentive to increase non-tax costs, and therefore there is no need to flow-through such expenses. AT&T states that under its tariffs, it flows through all state taxes that have the characteristics of the Connecticut gross receipts tax.[10]

9. Moreover, according to AT&T, there is no inconsistency between a gross receipts tax surcharge and nationally averaged rates. AT&T disputes that the GRTS will create geographical deaveraging of rates. Indeed, it argues, states have flowed through local or municipal gross receipts taxes for years, and that has not led to general intrastate deaveraging. According to AT&T, both state courts and public utility commissions have recognized that flowing through local or municipal gross receipts taxes prevents destabilization of averaged intrastate rates, and many have concluded that *not* flowing through special taxes would amount to unreasonable discrimination against non-resident ratepayers.[11]

10. Finally, AT&T argues that the surcharge is properly calculated. It explains that the surcharge, currently 6.77 percent,[12] is set to recover the 6.5 percent tax levied by Connecticut on AT&T's interstate switched services revenues (net of access and other deductions) and the 9.0 percent tax on the local exchange carriers' (LECs) interstate access revenues, which is flowed through to AT&T as higher access charges.[13] AT&T states that its computation of the surcharge takes into account the access charge deduction. It first determines the amount it expects to pay in gross receipts taxes directly, 6.5 percent of revenues minus access charges. To that it adds the gross receipts tax expense which the LECs collect through access charges. Thus, concludes AT&T, the composite tax factor recovers "the costs of the two taxes it was designed to collect."[14] AT&T also maintains that its interstate rates reflect the differences in cash flows and the time value of money. It represents that this is not affected by the implementation of the gross receipts tax surcharge.

11. In its reply brief, COCC essentially reiterates arguments previously advanced. It maintains that AT&T has failed to sustain its burden of proving that the surcharge is not unreasonably discriminatory. It asserts that requiring Connecticut customers to pay a portion of other states' taxes as well as all of Connecticut's gross receipts tax is not the "neutral, rational" policy that AT&T claims the GRTS supports. It disputes AT&T's contention that Connecticut is a "High-Cost" state.[15] It argues that "AT&T has failed to provide the basic cost data required of a carrier which wishes to support discriminatory treatment of like services through a policy rather than cost-of-service analysis."[16] In addition, COCC defends the Connecticut tax on "a seller's gross receipts" as opposed to an excise tax on "a customer's usage," such as the one imposed by the State of Illinois. Finally COCC argues that state government flow-throughs of municipal taxes are irrelevant to the issues here because states are not bound by the "anti- discriminatory prohibitions of the Federal Communications Act." Reply Brief at 30.

## II. DISCUSSION

12. We have reviewed the record in this proceeding and find no support for complainants' contention that the gross receipts tax surcharge collected in Connecticut by AT&T subjects Connecticut customers to unjust or unreasonable discrimination. There is no dispute that the interstate service provided to customers in Connecticut and the service provided to customers residing in other states are "like" services. There is also no dispute that customers in the ten states which impose a gross receipts tax on interstate telecommunications pay more than customers of the states which do not impose either a gross receipts tax or an excise tax on telecommunications.[17] However, the Communications Act does not bar all rate discrimination, only "unjust or unreasonable" discrimination. 47 U.S.C. § 202(a). We find that the gross receipts tax surcharge collected by AT&T in Connecticut is just and reasonable.

13. The Common Carrier Bureau observed in the *May 30 AT & T Order*, and we agreed in our *Review Order*, that the flow-through represents the allocation of specific costs directly to the originator of those costs; therefore, the flow-through itself is unlikely to be discriminatory. We stated that we would consider allegations in a complaint proceeding as to the discriminatory or otherwise unlawful effects of retaining *other* types of taxes in AT&T's nationwide averaged rates. *Review Order* at 550. COCC has made no such assertions. On the contrary, COCC would have us conclude that all taxes should be included in AT&T's averaged rates. COCC argues that it is unreasonable to flow-through one type of expense while pooling others, that the GRTS effectively deaverages rates for selective costs, and that, as a "low-cost" state, Connecticut already over-contributes its share of AT&T's costs in the form of averaged rates.

14. We have found that averaged national rates are in the public interest. *See , e. g., MTS and WATS Market Structure, Recommended Decision and Order*, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2324 (1987), *Report and Order*, 2 FCC Rcd 2953 (1987). Even if expenses are higher in some states than in others, averaging them furthers the public policy of encouraging affordable nationwide telephone service. *See* 47 U.S.C. § 151. Therefore, we agree with AT&T that whether Connecticut is a "Low-Cost" or "High-Cost" state is irrelevant to our determination of the reasonableness of AT&T's surcharge.

15. The question to be decided in this proceeding is whether the surcharge is a just and reasonable method for AT&T to recover a state-specific gross receipts tax expense. The issue turns on whether it is proper for AT&T to flow through the costs associated with the Connecticut gross receipts tax or whether AT&T is constrained to continue to keep those costs in the expense pool which forms the basis for AT&T's nationwide averaged rates. Thus, the question before us in this complaint is not whether other costs are properly included in the expense pool, but whether the Connecticut gross receipts tax may be properly excluded. We believe that it may. As we stated in the *Review Order*, this flow-through represents the allocation of specific costs directly to the originator of those costs.

16. The gross receipts tax at issue in this proceeding is a tax which singles out a particular target, in this case interstate telecommunications. AT&T has not questioned Connecticut's right to enact such a tax scheme, which places the tax burden on the seller, AT&T, rather than on the end user.[18] What AT&T's gross receipts tax surcharge brings into question, however, is who should ultimately pay this extra burden which Connecticut has decided to levy on interstate telecommunications, AT&T's customers in Connecticut, who receive the benefit of the tax, or AT&T's customers nationwide. We find that it is not improper for AT&T to recover this cost only from Connecticut residents. We agree with AT&T that, were AT&T not to flow through the gross receipts tax, states would have an incentive to target telecommunications carriers for special tax burdens and thereby export the cost of the tax to customers in other states, who do not directly benefit from, and who do not have the ability to influence the imposition of, this tax. Accordingly, we find that it is neither unjust nor unreasonable to pool taxes of general applicability, along with other expenses, in determining nationwide averaged rates, but to exclude gross receipts taxes.[19]

17. Nor do we agree with COCC's contention that AT&T's treatment of the gross receipts tax creates geographical deaveraged rates for selective costs. To the contrary, we agree with AT&T, and nothing in the record persuades us otherwise, that flowing through this tax does more to prevent destabilization of averaged rates by maintaining the integrity of the averaging process.[20] By limiting a state's ability and incentive to shift its tax burden to customers in other states through the averaging process, the flow-through reduces pressures to deaverage rates to reflect state-specific costs. Disaggregating gross receipts taxes is consistent with the treatment afforded local gross receipts taxes by various jurisdictions, and complainants have presented no evidence that it has led to any general intrastate deaveraging.

18. For the reasons stated above, we find that any rate discrimination caused by AT&T's gross receipts tax surcharge is not unjust or unreasonable discrimination. COCC misapprehends Commission standards for evaluating whether discrimination is unjust or unreasonable. The basis for determining if rates are unjustly discriminatory is not necessarily reliant upon a cost of service analysis. COCC's reliance on *American Television Relay*, 63 FCC 2d 911, 929 (1977) (*ATR*), to support its position that "AT&T has failed to present the FCC with a record of the

basic cost analysis required by law before considerations of non-cost factors may be initiated" is misplaced. Reply Brief at 14. The issue in that case was the use of population in the rate structure. Whereas population is a "non-cost" consideration, and thus required the submission of cost data to guide the Commission in its determination, the gross receipts tax surcharge is already cost-based, the amount of Connecticut's gross receipts tax. No further basic cost analysis is required to support our policy determination that this gross receipts tax surcharge is in the public interest and furthers the intent of the Communications Act.

19. COCC also is incorrect in its procedural argument that the burden shifts to AT&T to justify any discrimination, once there is a finding that the service in question is a "like" service. In a complaint proceeding, the complainant has the burden of proof. This burden does not shift to the defendant once the complainant has proved that the services are like. The cases cited by COCC are inapposite. For example, Western Union International, Inc. v. FCC and AT&T, 568 F.2d 1012 (2d Cir. 1977), was an appeal by international record carriers (IRCs) of a series of Commission decisions and orders in which the Commission determined, *inter alia*, that services provided to the IRCs were "essentially identical" to those provided to domestic carriers, found that the existing disparate rate structure was discriminatory, and ordered AT&T to eliminate the disparity. The court stated that "once the FCC demonstrated a basis for its determination of likeness, the burden shifted to the IRCs to disprove the discrimination in their favor." *Id.* at 1018-19. However, this was not a complaint proceeding, and the IRCs were not defendants. Moreover, one of the cases quoted by COCC to buttress its position clearly states that it is the burden *of proceeding* which shifts to the defendant after the complainant has established a prima facie case and not the burden of proof. *In the Matter of Referral of Questions from General Communications Incorporated v. Alascom, Inc.*, 3 FCC Rcd 700, 705 (1988). AT&T has met its burden of going forward and developing a record to support its position that its GRTS is not unjust or unreasonable.

20. Finally, COCC has presented no evidence to support its assertion that AT&T computes the gross receipts tax surcharge incorrectly. First, COCC appears to have made its calculations based on the 7.33 percent rate AT&T was charging until July 1, 1988. At that time the rate dropped to 6.77 percent. As AT&T explained, it recalculates the figure each year, and any overcharge one year will result in a reduction the next year. Second, AT&T deducts the access charges it pays the LECs before it applies the GRTS rate.[21] Therefore, it does not receive a double recovery for access charges. Nor does it overcharge by failing to take into account the time value of money, in this case the lag between the collection of the surcharge and the payment of the tax to Connecticut. In the *May 30 AT & T Order*, the Bureau considered whether AT&T would receive a windfall since it would accumulate revenues from the flow-through during the year, but would not have to pay its tax bill to the state until the following year. We agree with the Bureau that "the recovery of this cost is no different than any other for which the recovery of the cost does not necessarily coincide with the payment of the expense." *Id.* at ¶ 57. AT&T's interstate rates already reflect its working capital requirements, which in turn reflect differences in cash flows and the time value of money.

21. For the reasons discussed above, we find that the gross receipts tax surcharge provision in AT&T's interstate tariffs as applied to Connecticut ratepayers is not unjustly nor unreasonably discriminatory.

## III. PROCEDURAL ISSUES

22. Finally, we address complainants' request for a hearing and the motion for a procedural order establishing a hearing and discovery schedule. AT&T opposed the motion. However, after conferences with Commission staff, complainants submitted and AT&T responded to interrogatories. Therefore, the request for a discovery schedule is moot. As to the hearing issues, complainants argue that a hearing before an administrative law judge (ALJ) is necessary to permit them to present a full record of the basis for the discrimination, to protect the due process rights of complainants, and to ensure a fair disposition of the complaint. In opposition, AT&T cites various Commission decisions which indicate that formal complaints are ordinarily resolved on the basis of the written pleadings.

23. The Commission has discretion to resolve Section 208 complaint proceedings, 47 U.S.C. § 208, on the evidence of record without the need to resort to time-consuming and costly full evidentiary proceedings before ALJ's unless it determines a hearing is needed to resolve disputed questions of fact. *See, e.g., Comark Cable Fund III, d/b/a CCI Cablevision v. Northwestern Indiana Telephone Company, Inc.*, 104 FCC 2d 451 (1985), *remanded for clarification sub nom. Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205 (D.C. Cir. 1987), *clarified on remand*, 3 FCC Rcd 3096 (1988), *petition for review denied, Northwestern Indiana Telephone Co. v. FCC*, 872 F.2d 465 (D.C. Cir. 1989), *petitions for rehearing and for rehearing en banc denied* (D.C. Cir. June 27, 1989). As we have stated above, the facts complainants allege to be in controversy are simply not germane to the outcome of this proceeding. Thus, there are no disputed questions of fact which might necessitate that this matter be set down before an Administrative Law Judge. The complainants have been granted ample opportunity to develop evidence in this matter, including discovery, and all hearing requirements contemplated by Section 208 have thus been satisfied. Therefore, we deny the request to establish a separate hearing schedule before an ALJ.

## IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the motion for a procedural order establishing a hearing and discovery schedule IS DENIED.

25. IT IS FURTHER ORDERED that the complaint against AT&T Communications filed by COCC on March 18, 1988, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] Formerly the Connecticut Division of Consumer Counsel.

[2] Ten states currently impose a gross receipts tax on telecommunications.

[3] Complaint at 5.

[4] Brief at n.17, citing AT&T, Revisions of Tariff FCC No. 260, Docket No. 18128, 61 FCC 2d 587, 656 (1976).

[5] Connecticut obtained this figure from AT&T's Answer dated May 11, 1988.

[6] AT&T's Opposition to Direct Case of Connecticut (Opposition) at 2.

[7] *NARUC v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir 1984), *cert. denied*, 469 U.S. 1227 (1985).

[8] Opposition at 9, quoting from AT&T, 70 FCC 2d 593, 613 (1978).

[9] Opposition at 17.

[10] Opposition at 19.

[11] Opposition at 11-12 and cases cited therein.

[12] AT&T states that COCC has incorrectly mistated this as 7.33%. The surcharge was reduced to 6.77% as of July 1, 1988. AT&T recalculates the figure each year based on demand estimates, and any overcollection one year results in a reduction for the next year. Opposition at 27.

[13] Opposition at 26, which refers to Southern New England Telephone Company's 1988 Access Charge Tariff Filing.

[14] Opposition at 29.

[15] Reply Brief at 12.

[16] Reply Brief at *v*.

[17] The record indicates that eleven states impose sales or excise taxes on interstate telecommunications services. Customers in those states pay this tax in addition to AT&T's basic charge for interstate service.

[18] COCC cites Goldberg v. Sweet, 488 U.S. , 109 S. Ct. 582 (1989) (*Goldberg*), (upholding the Illinois telecommunications excise tax) for the proposition that, because taxing AT&T directly is justifiable, passing the tax through only to Connecticut customers is discriminatory. Reply Brief at 25. There is nothing in *Goldberg* to support this conclusion. The nexus for Connecticut to impose a gross receipts tax on AT&T is not at issue here. The question is, when AT&T seeks to recover the expense of this tax from its customers, should it recover the tax expense from its customers nationwide or only from its Connecticut customers. *Goldberg* does not even remotely touch upon that issue.

[19] Apparently Connecticut considered amending its gross receipts tax in 1986, but did not do so, at least partially because "chang[ing] from a gross earnings tax to an excise tax on interstate telecommunications will always raise [Connecticut] customer' [sic] bills," and an excise tax is seen by customers on their bills, but a gross receipts tax is "hidden." AT&T's Opposition at 4-5, quoting from Finance, Revenue and Bonding Committee, Connecticut General Assembly, Final Report of the Connecticut Telecommunications Task Force (1986). Apparently, the future applicability of our decision is somewhat limited since the record reflects that Connecticut has recently enacted legislation which eliminates the gross receipts tax on interstate telecommunications, effective January 1, 1990. It is one of five states which have repealed or reduced the gross receipts tax since AT&T instituted the gross receipts tax surcharge. Letter from David Carpenter, Attorney for AT&T Communications, to Secretary, FCC (July 31, 1989).

[20] *See* also, *May 30 AT & T Order* at 956 (" . . . the imposition of gross receipts taxes upon interstate services has a far more de-stabilizing impact on nationally averaged rates than does AT&T's attempt herein to ensure that only those who benefit from the tax will pay the tax").

[21] For example, to obtain the 6.77% tax factor, AT&T first calculated the 6.5% Connecticut gross receipts tax rate on 1987 billed revenues less deductions (including switched access charges) to obtain an effective tax rate on billed revenues of 3.35%. Then, using the statutory rate of 9.0% on interstate switched access, it computed the amount of its access expense which was attributable to the gross receipts tax on local exchange carriers. It calculated that this was 3.42% of estimated 1988 billed revenues. Adding these two factors, 3.35% plus 3.42%, resulted in the current composite tax factor of 6.77%. *See* Opposition, Affidavit of Louis Ambrose, Attachment A, for the specific numbers used in the calculation.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v. File No. E-87-41 and
File No. E-89-35

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

## MEMORANDUM OPINION AND ORDER

**Adopted November 2, 1989; Released: November 16, 1989**

By the Commission:

1. MCI Telecommunications Corporation ("MCI") filed two complaints against Southern Bell Telephone and Telegraph Company ("Southern Bell"). The original complaint (File No. E-87-41), filed February 26, 1987, alleged that interstate traffic sensitive switched access rates charged by Southern Bell in the State of Florida were unjust and unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). MCI requested that the Commission find Southern Bell's Florida switched access charges unlawful; order Southern Bell to reduce its switched access charges by at least $10.8 million; order Southern Bell to refund to MCI all overpayments of these charges during the period the unlawful rates were in effect (February 15, 1987 through December 31, 1987); and order such other relief as the Commission might consider appropriate.[1] Southern Bell denied the allegations. For the reasons explained below, we dismiss the complaints without prejudice.

## I. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. Southern Bell implemented a switched access traffic sensitive rate increase in Florida on February 15, 1987. BellSouth F.C.C. Tariff No. 1, Transmittal No. 56, filed Jan. 30, 1987.[2] MCI filed the instant complaint a few days after the tariff became effective, [3] advancing arguments similar to those raised in the tariff proceeding, namely, that approximately $10.8 million of the $33.1 million increase was unexplained.[4]

3. In an amended answer, Southern Bell maintained that the complaint is barred by a "Mutual Release of Claims and Covenant Not to Sue" executed in March 1987 ("Settlement Agreement" or "Agreement") and, therefore, MCI should be required to withdraw the complaint. It stated that MCI and Southern Bell had entered into an agreement:

> to settle and finally resolve all disputes related to billing for services, that have arisen between the parties for the period ending March 31, 1987, and to settle, compromise and resolve any other claims which may or could have arisen from activities undertaken by either of the parties for the period ending March 31, 1987 . . . .

The agreement was subject to certain exceptions not relevant here.

4. MCI maintains that this "Mutual Release of Claims and Covenant Not to Sue" is not a bar to its complaint. It states that the basic relief requested at the time the complaint was filed was a finding that the rates charged by Southern Bell were unlawful rather than a claim for damages. In any event, according to MCI, the Settlement Agreement does not bar the recovery of damages for the period beginning April 1, 1987. However, to clarify its position, MCI filed a Motion for Partial Dismissal, requesting that the portion of the original complaint that requested damages be dismissed without prejudice. Simultaneously, it filed a new complaint (File No. E-89-35) requesting damages incurred as a result of unlawful charges for traffic sensitive switched access in Florida from April 1, 1987, through December 31, 1987. In addition, in its initial brief, filed June 3, 1988, and in subsequent pleadings, MCI requests that Southern Bell be fined $1,000 for each day that its "unlawful" tariff was in effect. MCI contends that "Southern Bell's willful action to maintain rates that it knew, or should have known, would yield excessive profits merits the imposition of the sanctions of Section 205(b) of the Act as well as damages." Initial Brief at ii.

5. Besides reiterating its argument that the Settlement Agreement was intended as a general release of outstanding claims between the two parties, including MCI's then-pending complaint, Southern Bell contends that MCI's entire original complaint was mooted by MCI's Motion for Partial Dismissal. Therefore, Southern Bell filed a Motion to Dismiss, arguing that the original complaint requested three forms of relief: 1) a declaratory ruling that the 1987 rates were unlawful; 2) an order reducing the contested rates; and 3) a refund of all overcharges paid by complainant during the time these rates were in effect. It claims that after MCI's Motion for Partial Dismissal, recovery in this complaint is limited to prospective relief in numbers 1 and 2 above. However, the contested rates were replaced by new rates on January 1, 1988. Therefore, it concludes, MCI's complaint seeks only prospective relief for rates no longer in effect. Thus, argues Southern Bell, the complaint presents no viable case or controversy and should be dismissed as moot.

6. In its opposition to the Motion to Dismiss, MCI states that it is still prosecuting its request for a declaratory ruling and that despite Southern Bell's contention to the contrary, a decision by the Commission will affect the rights of the parties. It reiterates that it separated out the money damages claim to make it clear that it was not seeking damages for the period through March 31, 1987. But, in any event, it argues, a party can pursue a complaint without requesting damages. Further, it asserts that the issue of the tariff's lawfulness is not mooted by the fact that the tariff in question is no longer in effect.

## II. DISCUSSION

7. Turning to the procedural issues, we conclude that the proper forum in which to litigate the applicability of the Settlement Agreement is not this Commission, but rather, an appropriate court of law. Therefore, we will consider the merits of MCI's contentions without regard to whether the complaint might be barred by the Agreement.[5] Further, we agree with MCI that separating out the damages issue into a separate complaint does not render the complaint moot, nor does the revision of the contested tariff. Accordingly, we will first consider the issues as originally framed by MCI, before Southern Bell had billed and collected for services provided under the 1987 tariffs, based on alleged unexplained cost projections supporting Southern Bell's rate increase. We will then consider the arguments raised in the second complaint, as well as in supplementary briefs filed in 1988 in connection with the original complaint. These briefs were filed after Southern Bell calculated its actual earnings for 1987. In these more recent pleadings, MCI alleges that Southern Bell's earned rate of return for 1987 was unlawfully high and that damages are due in the amount of MCI's share of the excess earned over 12 percent.[6]

8. As stated above, MCI's original complaint requested a finding that certain Southern Bell rates were unlawfully high, and it sought orders requiring Southern Bell to reduce the rates, to refund overcharges, and to provide any other relief the Commission deemed appropriate. The complaint was filed less than two weeks after the Common Carrier Bureau examined the tariff support data filed by Southern Bell's parent, BellSouth, along with the comments and replies associated with the proposed tariff revisions, and determined that the proposed tariffs did not warrant suspension or investigation at that time. *Annual 1987 Access Tariff Filings*, 2 FCC Rcd 1188 (1987). MCI's complaint essentially reiterated arguments the Bureau considered but did not find persuasive prior to the tariff taking effect. MCI submitted no evidence which convinces us that, based on data available in February 1987, the rates were targeted incorrectly. Although MCI makes much of its calculations that $10.8 million of the $33.1 million increase was unexplained, that $10.8 million was only 4.5 percent of Southern Bell's total traffic sensitive switched access revenue requirement. MCI has not sustained its burden in this complaint proceeding of showing that, based on Southern Bell's cost projections, Southern Bell's rates were targeted to be unlawfully high. There is no evidence that, at the time the complaint was filed, MCI's projections were more accurate than Southern Bell's, or indeed that Southern Bell's projections were erroneous. Moreover, while Southern Bell's quarterly FCC Forms 492, submitted while the complaint was pending, indicated that Southern Bell's traffic sensitive switched access rate earned in excess of its authorized rate of return, and while MCI is correct that the LECs must target their rates to earn no more than their authorized rates of return, we have recognized that those rates ultimately may not produce earnings at precisely the authorized rate of return. *Authorized Rates of Return for the Interstate Services of AT & T Communications and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-527, at para. 5, 50 Fed. Reg. 41350 (Oct. 10, 1985) (*Phase I Order*), *recon.* FCC 86-114 (released Mar. 24, 1986), *summarized in* 51 Fed. Reg. 11033 (Apr. 1, 1986) (*Reconsideration Order*). Contrary to MCI's assertion that there should be no flexibility for Southern Bell, we have specifically provided the LECs a certain amount of regulatory flexibility in the form of midcourse corrections to their tariffs. *Phase I Order* at para. 24.

9. As for MCI's request for the imposition of a fine on Southern Bell, we find that a forfeiture is not warranted. Even if the Southern Bell tariff should be declared later to be unlawfully high, MCI has submitted no evidence which would cause us to investigate whether Southern Bell knowingly disobeyed a Commission order or regulation in setting the tariffed rate. The complained of tariff was part of the 1987 access tariff filings. After reviewing the filings, comments, and replies (including comments by MCI), the Common Carrier Bureau determined that the proposed tariffs did not warrant suspension or investigation at that time. Annual 1987 Access Tariff Filings, 2 FCC Rcd 1188 (1987). The rates were set based on projections. A mechanism was in place for carriers to make midcourse corrections if experience proved the projections to be inaccurate. Southern Bell followed that procedure and, indeed, revised its rates for the second year of the two-year period. Under these circumstances, refunds or damages, but not fines, are the appropriate remedy.

10. The remaining issue, then, is whether Southern Bell's earned rate of return in 1987 was unlawfully high, and whether damages are due to MCI.[7] MCI would have us limit to one year the period in which to determine Southern Bell's earned rate of return. However, this Commission has previously determined that the LECs' rates of return should be examined over a two-year monitoring period. In adopting such a policy, we concluded that a two-year, as opposed to a one-year, period should significantly reduce the carriers' risk of targeting error and the risk that frequent rate changes might be required to remain within the allowable return range. *Phase I Order* at para. 15. MCI has provided no reason why we should deviate from examining rates in relation to the two-year monitoring period. Therefore, we are dismissing the complaint without prejudice.[8]

## III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the complaint (File No. E-87-41) filed by MCI Telecommunications Corporation on February 26, 1987, IS DISMISSED WITHOUT PREJUDICE.

12. IT IS FURTHER ORDERED that the complaint (File No. E-89-35) filed by MCI Telecommunications Corporation on October 25, 1988, IS DISMISSED WITHOUT PREJUDICE.

13. IT IS FURTHER ORDERED that the Motion for Partial Dismissal filed by MCI Telecommunications Corporation IS GRANTED.

14. IT IS FURTHER ORDERED that the Motion to Dismiss the first complaint (File No. E-87-41) filed by Southern Bell IS GRANTED, but on other grounds, as stated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] MCI later filed a motion to dismiss that portion of the complaint which requested damages and filed a separate complaint (E-89-35) on October 25, 1988, requesting damages for the period April 1, 1987, through December 31, 1987.

[2] MCI filed a petition to deny the Southern Bell tariff.

[3] Microtel, Inc., a Florida-based long distance telephone company, concurred with MCI's arguments in the original complaint and requested that it be included in any grant of relief. Letter, Microtel, Inc., to Chief, Formal Complaints and Investigations Branch, Common Carrier Bureau (Mar. 27, 1987). However, Microtel must file its own complaint if it wishes to pursue an award of damages. *See , e. g.,* Certified Collateral Corp. v. Allnet Communications Services, Inc., 2 FCC Rcd 2171 (1987).

[4] MCI had originally argued in the tariff proceeding that $9 million of a $31.4 million increase was unexplained. However, in the complaint MCI adjusted the figures to reflect that the Commission had represcribed the authorized rate of return from 12.75 percent to 12 percent.

[5] The Agreement might be raised as a defense in an action to collect any damages awarded.

[6] MCI had been updating the record periodically to submit copies of! Southern Bell's quarterly reports to the Commission for 1987, in which Southern Bell reported returns for switched access ranging from 17.32 percent to 21.57 percent, averaging 19.23 percent for the year. MCI did not similarly update the record for 1988.

[7] At the time MCI filed its original complaint, the Commission had already adopted its Part 65 rules in CC Docket No. 84-800 which provide for Commission review of local exchange carrier (LEC) earnings in relation to authorized rates of return. In the Docket 84-800 proceeding, the Commission also established an automatic refund mechanism for earnings in excess of LEC prescribed rates of return. 47 C.F.R. § 65.703. However, the U.S. Court of Appeals for the D.C. Circuit invalidated the Commission's automatic refund mechanism. *AT & T v. FCC,* 836 F.2d 1386 (D.C. Cir. 1988). In light of this decision, the Common Carrier Bureau asked the parties to brief certain issues. *See , e. g,* Letter, Deputy Chief, Enforcement Division, Common Carrier Bureau, to Ruth Baker-Battist, *et al.* (Jul. 7, 1988). Southern Bell stated in its brief that, in the wake of *AT & T v. FCC,* the rate of return prescription is arguably enforceable by refunds only when applied to total interstate earnings for the BellSouth region. It is unnecessary to resolve the issue here, given our disposition of MCI's complaints.

[8] MCI is not prejudiced by this result. The statute of limitations will not bar full recovery of any damages MCI might have sustained as a result of Southern Bell's charges. For purposes of Section 415 of the Communications Act, 47 U.S.C. § 415, discovery of the "right or wrong" or of the facts on which such knowledge is chargeable in law occurs in this instance when defendant files its rate of return monitoring report for the two-year monitoring period. MCI could not have known about the defendant's earnings for the two-year period until Southern Bell or its parent, BellSouth, filed the final rate of return monitoring report, which was developed by this Commission specifically for the purpose of making this information available. We note that, in this regard, BellSouth recently filed its final monitoring report for the 1987-1988 reporting period, and the information contained therein may be the subject of a future complaint by MCI.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-604**

In the Matter of

Amendment of Section 73.202(b), RM-6271
Table of Allotments,
FM Broadcast Stations.
(Prairie Grove, Arkansas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 24, 1989; Released: November 16, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1238 (1989), proposing the allotment of Channel 235A to Prairie Grove, Arkansas, as that community's first local broadcast service. C.R. Crisler d/b/a Southside Broadcasting, the petitioner for the Prairie Grove allotment, filed comments and stated his intention to apply for the channel, if allotted to the community.

2. A staff engineering analysis indicates that Channel 235A can be allotted to Prairie Grove, Arkansas, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 8.7 kilometers south to negate a short-spacing to the application (BPH-870227IU) filed by Station KMCK(FM), Channel 289Cl, Siloam Springs, Arkansas, to relocate its transmitter and modify its facilities.[1]

4. We believe the public interest would be served by allotting Channel 235A to Prairie Grove, Arkansas, since it could provide that community with it's first local broadcast service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 2, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Prairie Grove, Arkansas | 235A |

5. The window period for filing applications at Prairie Grove, Arkansas will open on **January 3, 1990,** and close on **February 2, 1990.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] Coordinates for Channel 235A at Prairie Grove, Arkansas are 35-53-52 and 94-19-29.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-500**

In the Matter of

Amendment of Section 73.202(b), RM-6970
Table of Allotments,
FM Broadcast Stations.
(Stephenson, Michigan)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 24, 1989; Released: November 16, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Stephenson Radio Company (petitioner), requesting the substitution of FM Channel 272C2 for Channel 272A (vacant) at Stephenson, Michigan.[1] Petitioner stated its intention to file an application for Channel 272C2 at Stephenson.

2. We believe petitioner's proposal warrants consideration. Channel 272C2 can be allotted to Stephenson, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 19.7 kilometers (12.2 miles) north of the community.[2] The site restriction will prevent a conflict with Station WQTC-FM, Channel 272A, Manitowoc, Wisconsin, and Station WRVM, Channel 274C1, Suring, Wisconsin. Since the community of Stephenson is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested.

3. In order to provide a wide coverage area station for Stephenson, Michigan, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Stephenson, Michigan | 272A | 272C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence Roberts
Mark N. Lipp
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue
Suite 500
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

### APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Stephenson Radio Company's petition was filed as a counterproposal in MM Docket 89-245 but was unacceptable in that proceeding. Due to the interest in expanding service in the Stephenson area, we have accepted the counterproposal as a new petition for rule making.

[2] The coordinates for channel 272C2 are 45-35-31 and 87-36-10.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-501**

In the Matter of

Amendment of Section 73.202(b), RM-7041
Table of Allotments,
FM Broadcast Stations.
(Mora, Minnesota)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 24, 1989; Released: November 16, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by John James Godfrey (petitioner), requesting the substitution of FM Channel 238C3 for Channel 237A at Mora, Minnesota. Petitioner also requests modification of his construction permit for Channel 237A to specify Channel 238C3 (BPH-880107NB).

2. We believe petitioner's proposal warrants consideration. Channel 238C3 can be allotted to Mora, Minnesota, in compliance with the Commission's spacing requirements at the petitioner's specified site.[1] Since Mora is located within 320 kilometers (200 miles) of the U.S.-Canadian Border, concurrence of the Canadian government will be requested. We shall propose to modify the construction permit held by John James Godfrey for Channel 237A to specify Channel 238C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for Mora, Minnesota, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Mora, Minnesota | 237A | 238C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John James Godfrey
R.R.5, Box 186
Mora, Minnesota 55051

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for Channel 238C3 are 45-49-18 and 93-22-18.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-507**

In the Matter of

Amendment of Section 73.202(b), RM-6946
Table of Allotments,
FM Broadcast Stations.
(Breaux Bridge, Louisiana)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 16, 1989**

By the Chief, Allocations Branch:

1. At the request of JBC, Inc. (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 243C3 for Channel 243A at Breaux Bridge, Louisiana, and the modification of its construction permit to specify operation on the higher class co-channel, as that community's first expanded FM service. Petitioner states it will promptly construct the improved facilities, if permitted.

2. Channel 243C3 can be allotted to Breaux Bridge in compliance with the Commission's minimum distance separation requirements at the petitioner's proposed transmitter site, which is located 18.9 kilometers (11.7 miles) west of the city.[1] As requested, we shall propose to modify the construction permit for Channel 243A at Breaux Bridge to specify operation on the higher class co-channel, Channel 243C3, in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Breaux Bridge.

3. In view of the fact that Breaux Bridge, Louisiana, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Breaux Bridge, Louisiana | 243A | 243C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

David Tillotson, Esquire
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue, NW
Washington, D. C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates are 30-13-00 and 92-05-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-508**

In the Matter of

Amendment of Section 73.202(b), RM-6975
Table of Allotments,
FM Broadcast Stations.
(Gilchrist, Texas)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 16, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by James Owens, d/b/a Gilchrist Community Broadcasting (petitioner), seeking the allotment of Channel 268C3 to Gilchrist, Texas, as that community's first local FM service. Petitioner states its intention to apply for the channel, if allotted. Channel 268C3 can be allotted to Gilchrist in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Gilchrist could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Gilchrist, Texas | — | 268C3 |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James Owens
Gilchrist Community Broadcasting
306 Stratford Drive, 12
Houston, TX 77006
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The city reference coordinates are 29-30-48 and 94-29-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-509**

In the Matter of

Amendment of Section 73.202(b), RM-6816
Table of Allotments,
FM Broadcast Stations.
(Denison-Sherman, Texas)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 16, 1989**

By the Chief, Allocations Branch:

1. Transcontinental Broadcasting Company, Inc. (petitioner), licensee of Station KDSQ(FM), Channel 269A, Denison-Sherman, Texas, filed a petition for rule making requesting the substitution of Channel 269C3 for Channel 269A at Denison-Sherman, and the modification of Station KDSQ(FM)'s license to specify operation on the higher class co-channel. Petitioner states that it will apply for the upgraded facility, if authorized.

2. We believe the proposal warrants consideration. Channel 269C3 can be allotted to Denison-Sherman consistent with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] As requested, we shall propose to modify the license for Station KDSQ(FM) at Denison-Sherman to specify operation on Channel 269C3 in lieu of Channel 269A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Denison-Sherman.

3. In view of the fact that Denison-Sherman, Texas, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Denison-Sherman, Texas | 269A | 269C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 22, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Steve M. Kramer, P.E.
Stephan M. Kramer, P.E. and Associates
10500 Bighorn Trail, Suite 100
McKinney, TX 75070
(Consultant to petitioner)

Transcontinental Broadcasting Company, Inc.
444 Florida St.
Baton Rouge, LA 70821
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTE

[1] The coordinates are 33-41-24 and 96-40-28, which is located 13.6 kilometers (8.4 miles) southwest of Denison and 8.5 kilometers (5.3 miles) northwest of Sherman.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-50**
**(CORRECTED)**

In re Applications of

METROPLEX COMMUNICATIONS, INC. (WHYI-FM) File No. BRH-860801YJ

For Renewal of License

SOUTHEAST FLORIDA BROADCASTING LIMITED PARTNERSHIP File No. BPH-861030MH

For Construction Permit for a New Commercial FM Station Ft. Lauderdale, Florida

**Appearances**

*Nathaniel F. Emmons*, Esquire, *Eugene F. Mullin*, Esquire, *Howard M. Weiss*, Esquire, and *Lawrence Roberts*, Esquire, on behalf of Metroplex Communications, Inc.; *Lewis I Cohen*, Esquire, *Morton L. Berfield*, Esquire, and *Roy E. Boyce*, Esquire, on behalf of Southeast Florida Broadcasting Limited Partnership; and *Norman Goldstein*, Esquire, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

## DECISION

**Adopted: October 26, 1989; Released: November 17, 1989**

By the Review Board: BLUMENTHAL, and ESBENSEN; MARINO (Chairman) concurring in result.

Board Member BLUMENTHAL:

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 847 (1989) (" *I. D.* "), of Chief Administrative Law Judge Thomas B. Fitzpatrick ("ALJ") granting the renewal application of Metroplex Communications, Inc. ("Metroplex") for WHYI-FM, Ft. Lauderdale, Florida and denying the competing application of Southeast Florida Broadcasting Limited Partnership ("Southeast"). Exceptions to the *I. D.*, and reply pleadings, have been filed by both Metroplex and Southeast. [1] The Commission's Mass Media Bureau (or "Bureau"), also a party to the case, has filed its own "reply" pleading, which addresses the exceptions of both Metroplex and Southeast.

2. In brief, while the ALJ found that Southeast's purported "limited partnership" structure was a "sham" designed purely to exaggerate its comparative profile, and that Metroplex had countenanced a practice proscribed by Section 317(a) of the Communications Act (sponsorship identification), [2] he nonetheless concluded that both applicants were fully qualified for broadcast licenseeship. However, finding that the license-term performance [3] of WHYI was meritorious, thereby entitling Metroplex to a renewal expectancy, the ALJ ultimately determined that the 1986 application for license renewal filed for that station should be granted over the mutually exclusive application of Southeast. Before reviewing the exceptions of the parties, some background would be helpful.

### BACKGROUND

3. Metroplex, the incumbent licensee, is a Cleveland, Ohio corporation, which at the time of hearing held licenses for other commercial radio stations in the following cities: Raleigh and Kannapolis, North Carolina; Jacksonville, Winter Park, Clearwater, Atlantic Beach, Pinellas Park, and Mt. Dora, Florida. [4] Its two largest stockholders, each with a 46.6% equity interest, are Norman Wain (Chairman and Chief Executive Officer) and Robert Weiss (President and Chief Operating Officer). David Ross, who holds a 3.8% equity interest in Metroplex, is Executive Vice President of the parent corporation, as well as President of its Florida station division, and since 1978 the General Manager of WHYI.

4. Southeast, an entity created specially for the purpose of acquiring the WHYI license through its competing application, presented itself here as a "limited partnership," composed of ten individual "limited" partners, holding 96% of Southeast's equity, and one "general" partner, holding the residual 4%. Although neither Southeast itself, nor its "general" partner, Gloria Butler, hold attributable ownership interests in other broadcast stations, at least two of Southeast's "limited" partners do hold equity interests in other media enterprises. *I. D.*, paras. 187-188. [5] Were Southeast considered a *bona fide* "limited partnership," these collateral media ownership interests would be not at all cognizable under recently revised Commission policy, since the Commission presumes "limited" partners to be strictly "passive" investors, who neither can nor will exert influence or control over the applicant entity. *Attribution of Ownership*, 97 FCC 2d 997 (1984), *on reconsideration*, 58 RR 2d 604 (1985), *clarified*, 1 FCC Rcd 802 (1986). *See also*, *e. g.*, *Susan Mulkey*, 4 FCC Rcd 5520 (1989) (applying this attribution principle).

5. Moreover, and in practical operation, the competitive benefits of a "limited partnership" structure go far beyond rendering wholly noncognizable all of the other media ownership interests of any "passive" principals (such as "limited" partners or "non-voting" stockholders). That is, inasmuch as such "passive investor" principals are currently disregarded *entirely* from our consideration of each and all of the critical comparative attributes of a license aspirant (*e. g.*, "integration" of ownership with station management, local residence, civic activities, race and gender enhancement, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965)), the comparative attributes of the "active" equity principals (such as "general" partners or voting shareholders) are mathematically extrapolated *as if* these latter were the *exclusive* owners of the applicant, as in *Susan Mulkey*. Thus, for example, were Southeast to be considered a *bona fide* "limited partnership," Gloria Butler, while merely a 4% equity owner, would be regarded constructively as the *sole* equity principal of Southeast, thereby entitling the entire

applicant entity, by direct linear extrapolation, to a 100% quantitative ownership "integration" factor. That "perfect" *quantitative* "integration" factor would then be extended to Butler's personal local residence (and extrapolated to 100% for Southeast as a whole), and enhanced, twice over, for her race and her gender (also extrapolated to 100% for Southeast as a whole). [6] In other words, for comparative purposes, and despite her very slight equity share of Southeast, Gloria Butler's personal comparative attributes would be extended to Southeast *as if* she were the applicant's *sole* proprietor, were Southeast's limited partnership found to reflect the true and actual business relationship between, and amongst, the eleven equity principals involved, and not just a simulacrum intended to exploit artificially the operative mechanics of the Commission's newly relaxed *Attribution of Ownership* policies.

6. By way of additional background, the WHYI license here under challenge was last renewed in December 1985 for a period of only one year (rather then for the conventional 7-year period, *see* 47 U.S.C. § 307(c), as amended), in the wake of the Commission's 1985 review of the station's hitherto insufficient E.E.O. policies. *Metroplex Communications, Inc.*, FCC 85D-74, released December 20, 1985 (ALJ). To compound the burden for Metroplex, an issue was added in the instant hearing to determine whether the licensee exercised "reasonable diligence," as per Section 317(c) of the Communications Act, to assure that no undisclosed consideration attended the selection of certain of the station's recorded music, in the face of questions raised by Southeast in its petition to enlarge the issues in this case. The ALJ granted that petition and added the Section 317 issue.

7. After the evidentiary hearing, and as indicated, the ALJ found that during the foreshortened one-year term the licensee had complied with all FCC rules and policies, except for his perceived violation of Section 317(a); that WHYI had demonstrated a satisfactory record of public service; and that Metroplex had otherwise showed itself entitled to a license renewal. And, disregarding his own conclusion that Southeast's purported limited partnership structure was a "sham," the ALJ ultimately found that the Metroplex renewal expectancy outweighed, in any event, the promise of Southeast to be a superior licensee. Upon review of the record and the pleadings before us, we concur in result with the ALJ's determinations as summarized above, but view differently than the ALJ some of the reasons therefor, as witness below our treatment of the parties' exceptions.

## EXCEPTIONS

8. Southeast contends that the ALJ committed reversible error in his failure to find that Metroplex should have been held to a higher standard of vigilance to ensure against "payola," an offense it claims occurred regularly at the station. In view of WHYI's "high risk" as a prominent popular music outlet, Southeast submits that the licensee's "payola" controls were below the standard of "reasonable diligence" required under Section 317(c), for which breach alone its license should not be renewed. Maintaining that two of the licensee's key employees, Robert Walker (Program Director) and Frank Amadeo (Music Director), accepted numerous gifts such as record albums, Grammy Award tickets, and unknown quantities of cocaine from several record promoters who serviced WHYI, it also asserts error as well for the ALJ's failure to find actual "payola" at the station. [7]

9. Claiming further error, Southeast argues that the performance record of WHYI was minimal in terms of public service programming, that the ALJ incorrectly weighed that performance record against its own comparative virtues, and that since the station was operating under merely a one-year prior renewal, "little weight can be attached to a record complied 'under the gun'." [8] It also submits that the station's ascertainment of community needs was perfunctory in nature, and that little evidence was shown to incorporate these "perfunctory" efforts into WHYI's actual programming. Ergo, it propounds as a matter of overarching policy that if the renewal expectancy awarded by the ALJ for the performance of WHYI is left undisturbed, "[i]t would further place in question whether this result is the product of an institutional antipathy to the comparative renewal process mandated by the Communications Act." [9]

10. In that same vein, Southeast sharply faults the ALJ's rejection of its limited partnership structure as a "sham," concocted in bad faith by its principals and its attorney for the singular purpose of falsely skewing Southeast's comparative profile. It insists that, although its 96% "limited" partners have furnished all of the applicant's funding and have no personal acquaintanceship with Gloria Butler, Southeast's "limited" partners (some with significant ownership experience) will defer absolutely to Butler (who has no broadcast experience whatever) in the operation of any Southeast broadcast station. Repeating that Southeast's limited partnership agreement contains all of the boilerplate insulation provisions required under the Commission's *Attribution of Ownership* policies, *see* 58 RR 2d at 619-620, it asks the Board to overlook the complete financial dominance of the "limited" partners, and the fact that Butler played no role whatever in the formation of Southeast, and the fact that she has never even met eight of its ten "limited" partners, nor invested personally in the entity, but to regard as dispositive Southeast's written partnership agreement.

11. Finally, Southeast excepts to the ALJ's conclusion that Butler improperly certified the financial section of its application, and to his failure to add a separate hearing issue based upon Metroplex's alleged "misclassification" of a WHYI employee for E.E.O. purposes. In light of all of its exceptions, it seeks from the Board reversal of the *I. D.* and possession of the Fort Lauderdale station's FM license.

12. To the contrary, Metroplex assigns error to the ALJ's unprecedented interpretation of Section 317(a), claiming that the legislative history of the statute does not support his view that its acceptance of free records and record albums was a violation of the said stricture, because these surplus copies (sometimes 50 to 100) were provided *after* a choice had already been made to air those particular records. It further notes that its own interpretation is strongly supported by the Mass Media Bureau, which is delegated to the primary enforcement of that statutory provision.

13. Furthermore, Metroplex urges that the ALJ erred critically in finding that Southeast was financially qualified because: (1) Gloria Butler lacked all reasonable basis for personally attesting to Southeast's financial abilities [10]; and (2) Southeast's contract to pay its lawyers a $500,000 bonus, immediately upon a "final order" from the FCC

granting to Southeast its desired Construction Permit, exceeds the amount available under Southeast's loans (even assuming the underlying efficacy of such loans), thereby disqualifying Southeast conclusively. Even putting those two claims aside, it asserts that the expert retained by Southeast to estimate its construction and initial (three-month) operating budget proved both incompetent and inconsistent, which exacerbates the ALJ's error under Southeast's basic financial qualification issue. [11]

14. After studying the exceptions of the other two parties, the Media Bureau replied with some thoughts of its own. Despite having failed to lodge any timely exceptions, the Bureau nonetheless registers its harmony with Metroplex in denouncing the ALJ's fresh interpretation of Section 317(a). And, it also believes that Metroplex did not lack candor in failing to divulge voluntarily the facts giving rise to the Section 317 issue. It likewise supports the incumbent's charge that Southeast has not proven its financial sufficiency, while it champions Southeast on the question of whether Gloria Butler committed an actionable misrepresentation when attesting to the finances of the "limited partnership." Withal, the Bureau recommends that the WHYI license be renewed, and that Southeast be disqualified on the basic financial issue.

15. With that history, we review the specific exceptions, starting with license term performance of station WHYI. For the law has developed to favor a renewal applicant that has demonstrated that its stewardship has been marked by solid service to its community, and not materially blemished by the commission of applicable regulatory offenses. *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). Should it be found that WHYI has achieved that meritorious performance standard, renewal would ordinarily occur, no matter the superior "structural" attributes of the challenger, as otherwise gauged in contests for a new broadcast facility under the 1965 Policy Statement on Comparative *Broadcast Hearings, supra*.

## RENEWAL EXPECTANCY

16. In our recent *Seattle Public Schools*, 4 FCC Rcd 625 (Rev. Bd. 1989), we analyzed the prior comparative renewal decisions issued by the Commission in the wake of the court's seminal opinion in *Central Florida*. We there identified five discrete criteria against which we have measured the potential of a meritorious service record, thereby to calibrate the strength of any resultant renewal expectancy to the incumbent licensee. These five criteria are [12]:

> Criterion 1. The licensee's efforts to ascertain the needs, problems and interests of its community;
>
> Criterion 2. The licensee programmatic response to those ascertained needs;
>
> Criterion 3. The licensee's reputation in the community for serving the needs, problems and interests of the community;
>
> Criterion 4. The licensee's record of compliance with the Communications Act and FCC rules and policies; and
>
> Criterion 5. The presence or absence of any special effort at community outreach or towards providing a forum for local self-expression.

We consider the performance of WHYI, and Southeast's exceptions thereto, as against that quintet of core criteria. [13]

17. *Ascertainment of Community Needs and Problems.* Preeminent in our survey of the licensee's performance is its efforts to periodically take the pulse of its community. This public service benchmark was emplaced more than a quarter-century ago when the Commission decreed:

> The confines of the licensee's duty are set by the general standard 'the public interest, convenience or necessity.' The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this he has met his public responsibility.

*En Banc Programming Inquiry*, 44 FCC 2303, 2312 (1960). *See also Deregulation of Radio*, 84 FCC 2d 968, 981 (1981), *aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). That bedrock standard endures. *See , e. g., Simon Geller*, 90 FCC 2d 250, 271 (1982) ("the licensee's responsiveness to the ascertained problems and needs of its community remain 'central'"). [14] *Accord, Tele - Broadcasters of California, Inc.*, 58 RR 2d 223, 229-230 (Rev. Bd. 1985); *Pillar of Fire*, 99 FCC 2d 1256, 1259-1260 (Rev. Bd. 1984), *review denied*, 2 FCC Rcd 519 (1987); *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 631-637 (Rev. Bd. 1984), *modified*, 100 FCC 2d 817 (1985); *Kaye - Smith Enterprises*, 98 FCC 2d 675, 683- 684, *recon denied*, 98 FCC 2d 670 (Rev. Bd. 1984), *review denied*, FCC 85-192, released April 15, 1985, *aff'd by judgment sub nom. Hoffart v. FCC*, 787 F.2d 675 (D.C. Cir. 1986); *Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1166- 1169 (Rev. Bd. 1983), *modified*, 97 FCC 2d 61 (1984), *aff'd by judgment sub nom. Genesis Broadcasting Ltd. v. FCC*, 759 F.2d 959 (D.C. Cir. 1985), *cert denied*, 474 U.S. 946 (1985).

18. While Southeast criticizes the ascertainment process used by WHYI as "perfunctory," the record on this question is complete (*I. D.*, paras. 14- 19), and it supports the findings of the ALJ. In complying with its ascertainment duties, Metroplex employed several commonly-used and acceptable methods. One, it participated regularly in area-wide interviews with community leaders from Broward and Dade Counties. Interviewed at these quarter-annual sessions were approximately 75 leaders "from government, charitable, business, minority, women's, health, senior citizens', children's, religious, educational, political, and other civic organizations . . . ." *Id.*, at para. 14. Two, it hired a special consultant to analyze the interviews between WHYI officials and the various community leaders, after which the station's Director of Public Affairs, Joan Siani, suggested programming to coincide with the consultant's report. *Id.*, para. 17. Three, the station then developed its "issues/programs" list, placed that list in its public file, and renewed it properly every three months. *Id.*, para. 18. Fourth, its ascertainment consultant visited the station once a month to compare the station's program logs with its public "issues/programs" list, and he then discussed his findings with Metroplex officials. *Id.* And, fifth, WHYI supplemented its formal ascertainment with "informal interaction between the station's staff and

members of the public," as well as by using its daily morning call-in show to identify other topics of local interest and concern. *Id.*, para. 19.

19. Other than charging, altogether unspecifically, that WHYI's ascertainment efforts were "perfunctory," and characterizing the incumbent's use of a special ascertainment consultant "as an exercise designed to impress the Commission," Southeast's only substantive critique is that Metroplex provided "little evidence of meaningful efforts to incorporate these perfunctory efforts into programming." [15] It is to that pivotal incorporation process that we shift our focus.

20. *Programming Responsive to Ascertained Needs.* In paras. 21-47 of the *I. D.*, the ALJ examined the programming offered by Metroplex in its attempt to meet this prong of its performance burden. In the one-year license term here under review, the licensee leaned most heavily upon: (1) its weekday " *Morning Show* " program, which included regular segments of news, public affairs, call-in discussions of current events, and community-calendar notices; (2) " *Here's Help*, " a one-hour weekly nonentertainment program broadcast early on Sunday mornings; (3) " *Y's Rap*, " another early Sunday morning public affairs show; and (4) " *Y - 100 Listens To You.* " a 60-second feature interspersed regularly throughout the broadcast day (four to eight times daily), "featuring comments and discussion of topical concerns," as adduced in part by the station's News Director. *Id.*, paras. 32-33. Among the topics discussed on these regularly broadcast programs were drugs, alchohol, missing children, blood shortages, boating safety, education, social services, teenage pregnancy, casino gambling, insurance rates, the homeless, airline smoking bans, hand-gun control, transportation problems, and a myriad of other such subjects illuminating, we suppose, the rich kaleidoscope of human experience, from pit bull dogs to the spirit of American patriotism. *See id.*, paras. 24-27.

21. The hearing record also indicates that the station broadcast news segments at earlier listening hours during the week, *id.*, paras. 34, 37, as well as the general run of weather and traffic reports, school lunch menus, and a twice-weekly program from the Broward County Humane Society. It augmented these with a substantial number of on-air promotional campaigns for charitable and civic institutions, as detailed in paras. 50-87 of the *I. D.* Among the organizations participating in these benevolent campaigns were the National Multiple Sclerosis Society, the Muscular Dystrophy Association, the American Lung Association, the Greater Miami Heart Association, and the United Negro College Fund. Many other local and national eleemosynary institutions were represented in these licensee efforts. *See id.*

22. Statistically, WHYI devoted approximately 5.25% of its total broadcast programming to news and public affairs material. *Id.*, para. 20. Nonetheless, Southeast maintains that "WHYI's quantitatively minimal non- entertainment programming was also qualitatively unimpressive." [16] Citing prior Commission renewal decisions, its asserts that little or no credit should be accorded to nonentertainment programming broadcast at "graveyard hours, and it further complains that the station "had no full-time employee whose duties entirely related to non-entertainment programming." [17] Metroplex defends its record by submitting that a higher percentage of its "non-entertainment programming was aired between 6:00 a.m. and 10:00 p.m., [18] and that "the proper focus in reviewing an incumbent licensee's record in a 'comparative renewal' case is a *qualitative* one and not a *quantitative* one" (quoting *Intercontinental Radio Inc.*, 98 FCC 2d 608, 630-631 (Rev. Bd. 1984)).

23. In *Intercontinental Radio*, the Board observed:

> Although it is true that the Commission has initially consulted the quantitative breakdown of station program performance in every recent comparative renewal case, it is equally evident beyond argument from case and policy precedent that the statistical breakdown is merely one, *prima facie* indicator of station performance; a quick starting point, but no more than that. For as we observed in the recent, *Kaye - Smith* decision . . . the Commission has historically and persistently refused to equate raw statistical showings with licensee performance for purposes of "comparative renewal" evaluation. Thus, in *Formation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, 66 FCC 2d 419 (1977), the Commission purposively and expressly declined to adopt quantative standards as a determinative yardstick of a "comparative renewal" applicant's record, calling such a potential yardstick "a simplistic, superficial approach to a complex problem."

*Id.*, 98 FCC 2d at 630 (footnote omitted). We there relied not only upon the Commission's view that there is "no valid nexus" between its prior quantitative programming guideliness "and the rendition of substantial service in the comparative context," *Deregulation of Radio*, 84 FCC 2d at 986, but on the court's flat rejection of quantitative program standards in *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978). [19]

24. The ALJ applied the correct appraisal template in his I.D., *Concls.*, paras. 38-43, concluding that "WHYI conscientiously undertook to identify the needs and problems of its community" and that its "programming demonstrated a sensitivity and responsiveness to the needs of the community . . . ." *Id.*, at para. 45. Affording to Metroplex the broad programming discretion historically allowed by the Commission, *National Broadcasting Co.*, 47 FCC 2d 803, 806 (1974), the ALJ declined to substitute his judgment, or that of Southeast, for that of the licensee in the selection and scheduling of its nonentertainment programming. Even by diminishing WHYI's overall record for the issue-responsive programming that was broadcast at fringe listening hours, *see Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756, 763 n.** (D.C. Cir. 1983), [20] the balance of the evidence substantiates the ALJ's conclusion that the licensee has more than adequately met its cardinal responsibility to diligently ascertain the current needs, problems and interests of its community, and to air programming responsive to that ascertainment. Furthermore, and as next discussed, the licensee has gone considerably beyond its minimal duty with a series of community involvement activities that amplify its record of public service.

25. *Reputation in the Community.* In its landmark license renewal decision in *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966)(emphasis added), the court pointedly reminded the Commission of "our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life." Ever since Judge

(Justice) Burger's instruction, both the court and the Commission have considered relevant any evidence of a station's reputation in its community, for good as well as for bad, *see, e.g., Central Florida,* 683 F.2d at 508; *Victor Broadcasting,* 722 F.2d at 762; *Intercontinental Radio,* 98 FCC 2d at 632-633. [21] Twenty-three "public witnesses from governmental, charitable, civic, and business organizations in the Ft. Lauderdale/Miami area" gave evidence on behalf of the performance of WHYI, and their favorable testimony is recounted at paras. 93-116 of the I.D. The station's public file also held more than ninety letters of accolade received during the one-year license term from "local charitable, educational, governmental, religious, and community service organizations . . . ." Id., at para. 117.

26. Southeast's exceptions nevertheless posit that, "[w]hile public witness testimony is perhaps a factor that can enhance an otherwise verifiable and creditable programming record, it again cannot serve to create a basis for a renewal expectancy in the absence of a programming record that is otherwise sufficient to do so." [22] Finding nothing in Southeast's formulation with which we disagree, but having already found ample support in the hearing record for the performance that corroborates WHYI's favorable witnesses, we join the ALJ in considering positively this reputation evidence presented by Metroplex.

27. *Compliance With Act and FCC Rules.* No review of a licensee record can fail to reflect whether it has complied with the strictures set down to govern a broadcaster's conduct. *See, e.g., Central Florida,* 683 F.2d at 505. Indeed, so vital is this element as a performance litmus that the Commission's most recent policy statement on comparative license renewals tentatively suggests such compliance as the solitary index by which it might measure license term performance in future renewal cases. *See Third Further Notice of Inquiry, supra* note 13.

28. As detailed in the I.D., at paras. 286-415, and mirrored, of course, in Southeast's exceptions, [23] a critical issue permeating this proceeding is the question of whether the licensee has violated Section 317(a) by accepting unannounced consideration in return for the broadcast of program material, or its corollary Section 317(c) for failing to exercise "reasonable diligence" over its employees in assuring against a violation of Subsection (a). Section 317(a) provides:

> All matter broadcast by any radio station for which any money, service or other valuable consideraton is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Prov id ed, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

Subsection (c) of that basal prohibition further provides:

> (c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such" licensee to make the announcement required by this" section."

The Commission has elaborated upon these statutory requirements in Section 73.1212 of its own rules, 47 C.F.R. § 73.1212.

29. Although couched in the rubric of "sponsorship identification," one thrust of the statute is to help ensure against "payola" (or its companion offense "plugola"), as proscribed more directly in 47 U.S.C. § 507, (recodified and renumbered from former § 508, P.L. 96-507, 94 Stat. 2747, December 8, 1980). The gravamen of both Section 317 and Section 507 is that no hidden payments may animate a licensee's selection of broadcast programming, which selections must be guided by intrinsic merit rather than undisclosed consideration. *See Payola and Undisclosed Promotion,* 64 RR 2d 1338 (1988); *see generally also Financial Interests and Broadcast Promotions,* 76 FCC 2d 221 (1980) ("Plugola" Rule Making). In paras. 286-415, of this *I. D.*, the ALJ described a number of incidents and practices at the station which raised the initial questions under Section 317. While finding a violation of the statute for the licensee's regular acceptance of excess copies of certain records (and record albums), he found that practice not actionable here because his interpretation of Section 317 was "novel," and because he could find no evidence at all of *scienter. I. D., Concls.,* paras. 14-15. The ALJ further determined that the licensee had exercised "reasonable diligence" in assuring that its employees did not violate Section 317, *see id.,* paras. 16- 19, and that station employee acceptance of assorted gifts from record company promoters was not tied directly or indirectly to evidence of reciprocal musical selections at the facility. *See id.,* paras. 20-25. Southeast excepts to the ALJ's conclusions in almost every respect, and it complains that "payola" must disqualify Metroplex. We review the evidence under this issue.

30. The record before us contains the admissions of the licensee, and more directly, its Program Director (Robert Walker) and its Music Director (Frank Amadeo [24]), that a very close working relationship existed between the station and a number of record company promoters, which included the exchange of occasional gifts and favors quite welcome to both of the parties. For example, in addition to the more prosaic advertising trinkets (T-shirts, buttons, novelty kitsch, *etc.*), *I. D.*, paras. 340-341, the station (or its employees) accepted from certain record promoters extra rock concert tickets, *id.*, at 344-345, extra records, albums and cassettes, *id.*, at 351-375, tickets to the 1986 Grammy Awards (and quite possibly the cross-country transportation expenses attendant thereto), *id.*, paras. 376-390, as well as the customary holiday favors. *Id.*, para. 346.

31. Most disturbing to the ALJ was Program Director Walker's testimony, provided under a Fifth Amendment grant of immunity, *id.*, para. 401, that his socialization with a number of major record company promoters involved the frequent exchange of illicit drugs, namely cocaine and marijuana, *see id.*, at paras. 402-415. [25] Walker estimated that on perhaps "20-50 occasions," he shared such drugs with several promoters, with himself as the provider at certain times, and with the promoters provid-

ing on other occasions. *See id.*, paras. 404-405, 408. "He characterized drug use as 'pervasive' in the radio business in the Miami-Ft. Lauderdale area." *Id.*, at para. 403. Walker further averred that Music Director Amadeo was also present at many functions "where drug use took place," *id.*, at para. 409, that he shared such drugs with Amadeo, *id.*, but Amadeo's own testimony denied Walker's charges. *Id.*, para. 413. This drug sharing was alleged to have taken place at social gatherings away from the station, and not on radio station premises. At any rate, both Walker and Amadeo denied that any records were selected or played at WHYI in return for the provision of narcotics from these record company representatives. *Id.*, para. 414.

32. While neither the *I. D.* nor Southeast's exceptions directly or indirectly tie any of the station's specific music selections to the acceptance of gifts from particular record promoters, and the ALJ found no "payola" violation based thereon, the evidence does reveal that Amadeo, at least, felt beholden enough to certain record company representatives to assist in fraudulently promoting records for them, in a manner that demonstrates the extent of this informal symbiosis. Paras. 391-400 of the *I. D.* detail a practice whereby WHYI (a major popular music station in the Southeastern U.S.) would falsely report to the industry trade press (specifically *Radio & Records)* that it was regularly playing a particular record in its music rotation, when in fact it was not. The object, of course, was to overstate the popularity of that particular record, so that other radio stations throughout the country might add that title to their own broadcast repertoire. In the jargon of the radio and record trade, this practice is known as a "paper add," in that the purported "addition" to the station's record playlist was purely a "paper" fiction. The Metroplex Chairman, Norman Wain, became aware of WHYI's possible "paper add" practices in 1985, and he memorialized his view to employees that "paper adds" were a fraud on both the public and on those in the record business. *I. D.*, para. 400 (reprinting Wain memo of April 8, 1985). As to this practice:

> Amadeo explained his motivation by saying, "it's human nature to want to help people you work with." (Tr. 1195) According to him, there was no pattern by which a particular record company representative was helped by paper adds; it was done on an individual basis, and Amadeo believed that all the record representatives were helped, at one time or another.

*Id.*, at para. 395. Earlier in the *I. D.* (*id.*, at para. 394):

> Amadeo explained that the decision to do this as a favor to the record company representatives, who were under pressure from their superiors to get the records added to stations' playlists, was made by Walker and himself. According to Amadeo, the favor was listing the record on the playlist as an add and not in playing the record as a test record.

Although "Amadeo did not believe that 'paper adds' were illegal or against FCC rulings . . . [h]e believed them to be just a bad business practice." *Id.*, at para. 396.

33. In addition to the evidence of occasional drug provision by a number of record company promoters to WHYI's Program Director (and possibly to its Music Director), the ALJ considered the station's routine request for, and ordinary receipt of, "50 [free] promotional copies of each record it had added to its playlist," *id.*, at para. 351, as well as "25 to 150 promotional copies of a popular artist's album" to be used in connection with WHYI's on-air giveaway campaigns. *Id.* Metroplex asserts that no Section 317 sponsorship identification was triggered by its demand or acceptance because: (1) the surplus copies were used exclusively for internal and station promotion purposes; and (2) the copies did not constitute consideration or an inducement to broadcast a particular record, since the station solicited extra copies of a particular record *only after* that title had already achieved its limited playlist. Metroplex also avowed "that if a record company chose not to supply the promotional copies, WHYI would continue to play the record anyway based on its normal music selection criteria." *Id.*, at para. 355.

34. After evaluating all of the evidence under the Section 317 issue, the ALJ concluded that although the licensee had exercised "reasonable diligence" to assure compliance with Commission sponsorship identification requirements through several internal company safeguards (*i. e.*, employee handbook, employee affidavits, corporate memoranda, music selection committee), *see id.*, at paras. 288-333, its acceptance of free promotional copies of records and albums, even *after* selection to the station's playlist, constituted a tacit form of consideration, for which more specific sponsorship identification was mandated. *Id.*, *Concls*, paras. 2-16. [26] However, the ALJ discerned no other evidence of a violation of Section 317, or the Commission's derivative rules or policies concerning "payola," and he found no substantial evidence that the employee gratuities received from the record company promoters were provided in exchange for any particular program selection. *Id.*, *Concls.*, paras. 20-25.

35. As previewed earlier, Southeast disputes the conclusion that Metroplex exercised the required "reasonable diligence" under Section 317(c), and it asserts that the receipt by the station and its key managers of valuable gifts from record companies must be regarded as "payola" under the totality of facts here presented. Citing the Commission's May 1988 *Payola and Undisclosed Promotion* notice, Southeast's vanguard thesis is that "since WHYI is clearly a 'high risk' station given its high profile in the music industry," [27] it must be held to a higher level of "reasonable diligence" than it has evinced on this hearing record. Thus it submits [28]:

> The *ID* also fails to note that what is "reasonable" may vary depending on the situation of each licensee. Thus, what is "reasonable" in the case of a licensee whose operations or format are unlikely to attract payable [sic] might be insufficient in the case of licensees in a more high-risk position. This was recognized in the [1988] *Payola Notice*, which indicated that stations which report to record charting sevices would have to demonstrate greater diligence than might otherwise be sufficient.

In sum, it contends that "[t]he record reflects that WHYI's payola controls were properly characterized as token, especially in view of the station's uniquely sensitive position in the industry and the repeated inability of these controls to in fact uncover questionable conduct." [29]

36. Metroplex and the Mass Media Bureau reply that the ALJ erred in his construction of Section 317(a), and both parties likewise reject Southeast's assertion that the "payola" control procedures at WHYI were inadequate under the statute or cognate Commission rules or policies. The Bureau maintains [30]:

> Simply stated, Southeast sets up a smokescreen alleging all sorts of nonfeasance and misfeasance on the part of Metroplex, despite the fact that there is simply no record evidence which demonstrates that any matter was broadcast over station WHYI, as a result of inducements of valuable consideration being profferred to the station or its employees. The *Initial Decision* properly concluded that there was a history of licensee concern with measures to control and avoid the possibility of "payola" (*I. D.* at para. 18), and that "WHYI management continually sought to educate and sensitize its employees as to the impropriety of payola by communicating the licencee's concern about payola and cautioning employees that they were not to play records in return for consideration received from record companies or promoters." (*I. D.* at para. 19). With respect to Southeast's contention that the *Initial Decision* erred in exonerating the licensee for failing to trigger a "comprehensive investigation" once there was "ample basis for suspicion" that there may have been "payola" involving drugs, the Presiding Judge correctly ruled that "[a] licensee is not the guarantor as to its employees' behavior during nonworking hours; rather its duty is to exercise 'reasonable diligence' to safeguard against payola (*I. D.* at para. 23)."

Metroplex claims [31]:

> Since the "reasonable diligence" requirement of Section 317(c) is but a means to prevent "payola," there can be no basis for holding that a licensee violated Section 317(c) where no "payola" occurred. Stated differently, if the operative facts of a situation did not require that a sponsorship identification announcement be made, the licensee cannot be said to have violated a duty to learn of facts that *did* require such an announcement. Moreover, Congress certainly did not intend, through Section 317(c), to visit regulatory sanctions upon broadcasters whose stations are "payola"-free.

37. Upon review of the record and the pleadings, we find ourselves mostly in accord with the ALJ's resolution of this issue, but decline to affirm his interpretation of Section 317(a) until such time as a more definitive statement is available on the common industry practice of licensee acceptance of excess copies of records and albums from record companies or distributors. Without disagreeing with the proposition that record promoters can use such largess to curry favor with broadcast station owners, it is only by an expansive reading of the statute that this ordinary industry custom could be considered, *per se*, an improper practice, without a further showing of inducement. Section 317(a) specifically provides that no sponsorship identification is required unless a "service or other valuable consideration is directly or indirectly paid" *in exchange* for the airing of the particular program material; and the statute proceeds to stipulate carefully that "unless [the "service or other valuable consideration"] is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark or brand name *beyond an identification which is reasonably related to the use of such service or property on the broadcast* " (emphasis added), no violation has occurred. So far as the evidence here shows, no identification of any record or album, beyond that tied to the artist's name and the record title, was sought by the distributors or furnished on the air by WHYI. Or, put another way, the identification aired by WHYI in connection with its giveaway promotions would appear to be "reasonably related to the use of such [a record] on the broadcast," even though the promotional copies were furnished by the record companies "without charge." The station simply identified the artist and title of the selection it had just aired, and permitted some of its listeners to acquire a gratis copy.

38. The Board recognizes, as did the ALJ, that the practice of accepting promotional copies of records or cassettes could in appropriate cases be regarded as consideration "indirectly paid" to help secure the airing of that specific selection, and that proving a causal relationship between the two is a difficult task in the absence of the demonstrative presence of an agreement or an unusual inducement. We also appreciate that any such agreement or inducement between a station and a record company can be tacit as well as express. *See I. D., Concls.*, para 5. But here, there is no evidence whatever of any agreement or inducement, tacit or otherwise, beyond the circumstances readily apparent on their face. Since the practice of providing radio licensees with multiple copies of records and tapes for use as promotional prizes is longstanding and a matter of common knowledge in the industry, and the Commission has never suggested the practice to be a *per se* violation, no penalty shall be visited upon Metroplex now, when no precedent or admonition could have fairly alerted it to the ALJ's fresh construction. *See Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976) ("[t]he licensee's violation, then, consisted fundamentally in failing to predict the new interpretation"); *see generally also Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.) ("elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected"), *cert. denied*, 429 U.S. 895 (1976); *Pressley v. FCC*, 437 F.2d 716, 721 n.5 (D.C. Cir. 1970). Should the Commission wish to use this adjudicatory case to clarify its views on this commonplace practice, it might take this opportunity to do so, or opt instead to promulgate a universal policy statement for the benefit of our licensees, the record industry, and the general listening public. Until then, we will abjure and not make the essential policy judgment ourselves, for policy making is the province of the Commission, *en banc*, and not this subordinate Board. *Horne Industries, Inc.*, 91 FCC 2d 1193 (Rev. Bd. 1982); *Video 44*, 102 FCC 2d 408 (Rev. Bd. 1985).

39. Having declined to confirm a statutory violation of Section 317(a) on the part of Metroplex for the promotion practice just discussed, it would appear anomalous (though not necessarily impossible) to agree with Southeast that Metroplex had failed to use "reasonable diligence" to prevent the occurrence of "payola" at WHYI. Still, like the eggs and the omelette, the former does seem a logical predicate for the latter. Even assuming, *arguendo*, this premise to be erroneous, we accept the ALJ's conclusion that the prophylactic measures taken by Metroplex were sufficient -- *at that time* -- to comport with the "reasonable diligence" standard of Section 317(c). The record shows that the licensee made a conscious effort to see that its employees selected records on the basis of likely popularity, and no preponderance of evidence was presented by either Southeast or the Media Bureau to indicate that the musical selections aired by the station were chosen for unstated reasons. Without any such persuasive evidence, no renewal penalty appears warranted here.

40. But, alerted now by some of the revelations in this case, and cautioned by the Commission's May 1988 *Payola and Undisclosed Promotion* notice, Metroplex would be doubtless prudent to elevate its scrutiny of future relationships between its employees and the record promoters who service its Fort Lauderdale station. For the testimony discloses that two of its key managers, Amadeo and Walker, enjoyed in the past a relationship with these promoters that might have potentially conduced to problems with "payola. While no single gratuity or favor from the promoters has been linked by the probative evidence to any particular program selection, it would be naive to believe that the cumulative receipt of drugs, Grammy Award tickets, airline travel (and so on and so forth) might not eventually impact upon certain program choices. As a matter of fact, the station's submission of "paper adds" to record charting publications is a clear example of deliberate favoritism by employees at the station. Moreover, Walker's excuse for the "paper adds" that "it's human nature to want to help people you work with" captures succinctly why a *quid pro quo* might be inferred in some of his personal selection of program material, although we concede that no solid evidence shows any such linkage. Without going so far as to suggest impropriety in the occasional acceptance of gifts of token value from record company agents, the evidence here shows several instances where station managers went beyond wholly benign conduct, as witness Walker's apparently regular acceptance of drugs and Amadeo's "theft" of hundreds of promotional record albums, which he later sold for personal profit. *See I. D.*, paras. 363- 364. [32] We here offer the licensee a gratuity of our own: "Once burnt, twice smart." Metroplex might well take to heart the evidence disclosed, and decide for itself that tighter controls would be helpful to it, lest the Commission make that election for it pursuant to the agency's most recent caveat on "payola." The Commission there publicized the criminal indictment of several radio industry employees who accepted "cash and cocaine" in exchange for the broadcast of particular records, and it warned "higher risk" stations such as WHYI that "greater diligence" to prevent "payola" would be expected in the future, or serious administrative sanctions could follow. 64 RR 2d at 1338. However, as all of the incidents described in the *I. D.* preceded by several years the Commission's 1988 demand for a heightened licensee scrutiny, and as no firm evidence of "payola" at WHYI was placed on the record here, we shall leave it at that, for the nonce.

41. *Community Outreach* : While not precisely identified in Commission renewal policy statements as a separate service factor, the Board has examined whether a licensee "has reached out beyond the station into its community with offers of station help and support," *Intercontinental Radio*, 98 FCC 2d at 643, in order to help gauge the strength of that licensee's commitment to its community, or whether its efforts have been perfunctory (to use the term employed by Southeast). We will not rehearse the entire skein of community involvement activities outlined by the ALJ within paras. 48-87 of the *I. D.*, but incorporate them here by reference. Suffice it that these activities were many and variegated, as for brief example its participation in such community events as *Job Expo*, *Summer Jobs for Youth*, *Winterfest*, *Hispanic Heritage Festival*, and so on. For its efforts, and as already noted above, it received the testimonial support of nearly two dozen appreciative organizers and participants. Many of these events were furnished both on-air and off-air support by WHYI and its officials. These are not the labors of a distant and disinterested licensee, but instead bespeak a sincere involvement in its community's welfare. Hence, although this criterion does not carry, perhaps, the weight of the other performance elements we have discussed above, we reject Southeast's contention that community outreach activities that are associated with local public service campaigns should receive no recognition whatever in computing a licensee's potential renewal expectancy. When considering whether a licensee's commitment to public service is "above mediocre," *see Central Florida*, 683 F.2d at 508, community outreach is, we believe, another helpful signal of any such devotion.

42. *Summary*. Having concurred with the ALJ that WHYI's ascertainment and program response mechanism was in good working order during the time period under review, and having found no serious violaton of law or disregard for regulatory compliance, [33] we have looked to such supplemental indicia as the licensee's reputation in the community as well as any other factors (*e. g.*, community outreach) that would provide textural definition to the station's performance record. While we have examined renewal records with a higher quantitative percentage of nonentertainment programming, *see, e. g., Royce International*, *supra*, we agree with the ALJ that the Metroplex record was in fact sound, favorable and substantial. As we have perused Southeast's exceptions to that conclusion, we find that much seems criticism for the sake of advocacy, and little (save Section 317 arguments) of a tangible nature. Our independent test of the record affirms that Metroplex had every right to harbor a renewal expectancy, and could not have reasonably anticipated any loss of license for its efforts. Despite our ratification of the *I. D.* in this pivotal regard, we shall review the exceptions centering on Southeast's own competing application to determine whether Southeast has transcended the renewal expectancy earned by Metroplex.

## SOUTHEAST'S COMPETING APPLICATION

43. *Ownership Structure*. In concluding that Southeast here profferred a "sham" limited partnership structure in a cynical attempt to exploit the personal comparative attributes of its purported "general" partner, Gloria But-

ler, the ALJ traced the organizational history of the entity, and the respective roles of Butler and Southeast's "limited" partners, the latter representing 96% of Southeast's total equity. Southeast declared that its limited partnership agreement comports in all respects with the Commission's ownership attribution requirements, and that irrespective of the pre-filing activities of its "limited" partners, Gloria Butler will exercise total dominion over Southeast, should its application be granted over that of Metroplex.

44. As reported to the Commission, Southeast's equity principals are:

| Name | Status | Equity |
|---|---|---|
| CMNY Capital L.P. | Limited Partner | 24.0% |
| Bernard L. Perry | Limited Partner | 12.0 |
| Alan J. Courtney | Limited Partner | 12.0 |
| Arthur B. Baer | Limited Partner | 10.8 |
| Richard A. Levin | Limited Partner | 10.8 |
| Melvin L. Katten | Limited Partner | 6.0 |
| Louis A. Holland | Limited Partner | 6.0 |
| Kenneth S. Grossman | Limited Partner | 6.0 |
| Gerald B. Cohen | Limited Partner | 6.0 |
| Gloria R. Butler | General Partner | 4.0 |
| Joan Baer | Limited Partner | 2.4 |

*I. D.*, para. 119. In the spring of 1986, the law firm of Cohen & Berfield informed its client, Bernard Perry, a New York communications entrepreneur, of an opportunity to file a competing application for the license of WHYI. Upon advising Perry of the Commission's minority and gender preferences, and suggesting that the law firm could recruit a local Ft. Lauderdale resident with those favored characteristics, counsel Lewis Cohen then proceeded to invite several other clients from Chicago (Messrs. Holland, Katten, Grossman, and Gerald Cohen) to invest in the Southeast application, along with the New York group of investors (Messrs. Perry, Courtney, Davidoff, Baer, and Levin).

45. On May 16, 1986, counsel met in New York with Perry, Davidoff and Baer to explain the proposed venture in greater detail. Counsel suggested use of the "limited partnership" structure so as to take advantage of the FCC's comparative policy preferences, and he further laid out the financial demands of the enterprise, including: (1) an immediate $50 thousand retainer towards a "capped" $200 thousand fee for his prosecution of Southeast's application; and (2) a $500 thousand bonus, if their application is granted by the FCC. Gloria Butler had not yet been recruited, but counsel suggested that any person subsequently recruited to be Southeast's "general" partner be given a 4% equity share as a "carried interest" or "sweat equity." Para. 144 of the *I. D.* summarizes Baer's recollection of that initial meeting in New York and his perception of the fundamentals of the venture:

> A law firm specializing in FCC matters (Cohen & Berfield) is representing a group of investors trying to obtain a radio station license. They will be applying in opposition to the present holding. The value of the license is believed to be about $20 million.
>
> Bernie Perry brought us into this deal and we are splitting the available percentage with CMNY. CMNY and the two Unicorns together will each put up $62,500, or 31.25% of the case for 24% of the profits. The difference represents the promotions to the General Partner (4%) and to Perry (20%).
>
> The attorneys are capping their fees at $200,000. Any more, they bear. They feel that legal costs will run at least $250,000, so they anticipate they are kicking in $50,000 if the legal process runs its full course. Their cuts in the event of various outcomes are:
>
> 1. If we lose, they get nothing more.
>
> 2. If the case is settled for cash, the attorneys get a bonus of 15% of any funds above the capital contribution.
>
> 3. If the case is settled by the owners selling the license to us at some heavily discounted value, then the lawyers get $250,000.
>
> 4. If we win the license, the attorneys get a bonus of $500,000.
>
> The attorneys advise us that winning takes a year at the FCC and two years in the appeals process.
>
> The attorneys believe the case is very strong here. The present license holder lost an FCC trial last year and received only a one-year probational [sic] extension.
>
> The attorneys will spend the first $50,000 assembling evidence and interviewing witnesses. If at this stage the case looks weak, we can abort it there.
>
> Their assessment is: "We're not saying this is a piece of cake, but it looks like there's a solid enough basis to mount a challenge. I can't imagine you could lose a nickel on this."

46. In response to Baer's "great concern" that the venture was speculative, and his desire that there be some way to "salvage our money" if Southeast's bid to displace Metroplex waxed unsuccessful, counsel explained to Baer as follows, from Baer's hearing responses (Tr. 3340-3342):

> Q. Mr. [Lewis] Cohen told you that in prior renewal challenges that he had handled, either the license had been obtained or a financial arrangement had been made?
>
> A. Yes.
>
> Q. What sort of financial arrangement?
>
> A. I understand that there are some cases where a settlement is reached short of winning the license which can be financially satisfactory.
>
> Q. Was there a discussion as to whether such a settlement could be arranged in this case?
>
> A. Yes. I brought up the whole subject of, let me call it the downside risk. I knew in order to convince my two members of the investment committee that this investment was a good idea, I would have to show them that it wasn't an all or nothing proposition. They don't like the idea of investing the client's money and seeing it go totally down the tube. So I brought up the subject at that May 16th meeting whether or not this was all or nothing. Was it a situation where either we won the license and

therefore did very well financially, or we lost everything. And I remember asking Mr. Cohen whether there was a chance that there may be some salvage to our money even if we did'nt win the license. And he explained to me that there were some intermediate outcomes short of winning the license that could also occur. One of them was that in some cases such as this the challenging group may buy the station at a discount from fair market value from the group that's being challenged. So there's a profit in that, or there may be an outcome that you reach a financial settlement with the company being settled that's more than zero but less than if you bought the station at a discount. So there could be gradations of financial results and we did'nt have to come out absolute winners to protect our investment. And that was of great concern to me.

Q. Did Mr. Cohen tell you what amounts he had been able to obtain for clients in other proceedings?

A. I've forgotten specific amounts, but there was some general results discussed. I think he was involved in a challenge to licenses of some RKO stations that were satisfactory, very satisfactory.

Q. Satisfactory in what sense?

A. That the challenging groups did well.

Q. Did well in what sense? A. Won the license or won financial settlements.

JUDGE FITZPATRICK: In excess of what they actually expended?

THE WITNESS: Yes.

47. With the architecture of the venture in place, counsel requested that Davidoff's firm, CMNY Capital, furnish a $600 thousand loan commitment letter, a draft of which letter counsel would supply. On May 21, 1986, Cohen sent the "limited" partners a retainer agreement calling for the $50 thousand deposit, setting a payment schedule for the $150 thousand balance, and incorporating the $500 thousand bonus. By June 9, the "limited" partners had all assented and met their preliminary financial obligations. Their net current investments are reported as follows:

| | Initial Call | 30 Days After Limited Partnership Agreement Filed | 15 Days After Designation | Subsequent Calls | Total Contribution |
|---|---|---|---|---|---|
| CMNY | $7,812 | $7,814 | $15,625 | $31,250 | $62,500 |
| Perry | 1,562 | 1,563 | 3,125 | 6,250 | 12,500 |
| Courtney | 1,562 | 1,563 | 3,125 | 6,250 | 12,500 |
| A. Baer | 7,812 | 3,516 | 7,032 | 14,062 | 32,422 |
| Levin | - 0 - | 3,516 | 7,032 | 14,061 | 24,609 |
| Katten | 1,562 | 1,563 | 3,125 | 6,250 | 12,500 |
| Holland | 1,562 | 1,563 | 3,125 | 6,250 | 12,500 |
| Grossman | 1,562 | 1,563 | 3,125 | 6,250 | 12,500 |
| G. Cohen | 1,562 | 1,563 | 3,125 | 6,250 | 12,500 |
| J. Baer | - 0 - | 781 | 1,562 | 3,125 | 5,468 |
| Butler | - 0 - | - 0 - | - 0 - | - 0 - | - 0 - |
| | $24,996 | $25,004 | $50,001 | $99,998 | $199,999 |

*I. D.*, para. 146.

48. Contemporaneously, counsel scouted for a "general" partner for the investors. Through another client (who also held a McDonald's restaurant franchise), counsel was given the name of Gloria Butler, a fellow Florida McDonald's franchisee. On May 20, counsel interviewed Butler in Miami; and on June 12, at counsel's expense for her travel and hotel accommodations, Butler traveled to New York for a next-day meeting, described by the ALJ as follows:

> *The June 13, 1986, Meeting in New York* - Present at the June 13 New York meeting were Cohen, Butler, Perry, and Davidoff. This is only occasion when any of Southeast's limited partners ever met Butler, except for a chance encounter she later had with Perry at the hearing. The meeting lasted about three hours. Perry and Davidoff interviewed Butler with regard to her background and history, including her McDonald's businesses. There was no discussion of her knowledge of WHYI's operations, the staffing or format of the proposed station, or the station's transmitting facilities and how they would be obtained. She was asked "generally" about her financial condition, but no effort was made to determine whether she could afford an investment in Southeast or whether she could sustain her liability as a "general" partner. Butler learned at the meeting that Perry had a "radio interest in Connecticut." She also gained a "general understanding" that "some of these people knew each other from previous relationships," but she had no understanding of the specifics of those relationships. She did not ask and was not told by Cohen until later how Perry, Baer, and Davidoff came to be involved in Southeast. Butler was given a draft partnership Agreement that assigned her a 4% interest. Perry and Davidoff proposed this figure to her during the meeting.
>
> At the end of the interview, Cohen, Perry, and Davidoff met alone and discussed Butler's qualifications. They then decided to offer her the position of general partner, and they reconvened with her to extend the offer. Butler was asked to review the partnership and retainer agreements and, if she decided to accept the offer, sign and return them. Within two weeks of the June 13 meeting, she signed and returned the limited partnership agreement and retainer agreement.

*I. D.*, paras. 151-152 (Tr. citations and footnote omitted). So far as the record shows, Southeast's New York and Chicago "limited" partners have scant respective acquaintance with each other; and none of its "limited" partners are acquainted with Butler, beyond what little the ALJ has reported above. Butler herself has not invested financially in the enterprise, or furnished her "limited" partners with additional data as to her past business experience or her record of financial responsibility. And, unlike several of Southeast's "limited" partners, Butler has no prior experience in the broadcast business.

49. Southeast contends that, notwithstanding this organizational chronology and the general lack of familiarity amongst its disparate principals, Butler did work with counsel in completing Southeast's application, particularly the ascertainment and E.E.O. sections. It cites the decision in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), where the Commission reversed the ALJ and the Board and fully credited a limited partnership (with a 15% "general" partner also recruited quite late in the process) as a *bona fide* applicant, and it received the eventual grant. [34] As to the marginal nature of Butler's equity interest, Southeast asserts "that the Commission has yet to endorse prior suggestions that equity interests of less than a specified percentage be viewed as inherently suspect," and that its ownership structure "reflects a business judgment concerning the sharing of risk among a large number of partners." [35] Relying upon the 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d at 396 & n.8, Southeast further contends that Butler's lack of broadcast experience is "remediable," and that the evidentiary factors considered by the ALJ in his negative assessment of its ownership structure were "either irrelevant, trivial or simply wrong," when its written partnership is accorded decisional primacy under *Victory Media*. [36]

50. As is by now widespread knowledge, the Commission's relaxation of its ownership attribution rules, when conjoined with its various comparative preferences and the statutory amendment removing all monetary limits from applicant settlements in comparative licensing cases, [37] has spawned a plague of "sham" applications which project a bogus two-tier ownership structure in order to skew the comparative mathematics. The recent rash of "sham" applications has been nearly without number, but illustrative variations of the ploy may be found in *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *modified*, 102 FCC 2d 288 (1985), *affirmed by judgment sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986); *N. E. O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986); *Pacific Television Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 4541 (1988); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 (Rev. Bd.), *recon. denied*, 1 FCC Rcd 1267 (Rev. Bd. 1986), *review granted in part and denied in part*, 2 FCC Rcd 6080 (1987), *aff'd by judgment sub nom. Spectron Broadcasting Corp. v. FCC*, 858 F.2d 744 (D.C. Cir. 1988); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513 (Rev. Bd. 1987), *recon denied*, 3 FCC Rcd 488 (Rev. Bd. 1988), *review denied*, 3 FCC Rcd 7186 (1988).

51. This perverse phenomenon has not gone unremarked in the press, *see, e. g.*, Barnes, *Investors Use Blacks As Fronts To Obtain Broadcasting Licenses, Wall St. J.*, December 11, 1987 at 1, col. 1; Tillotson, *FCC's Comparative Process As A Sham And A Shamble*, BROADCASTING, October 5, 1987, at 22, or at the Commission, *see Revision of Application for Construction Permit*, 4 FCC Rcd 3853, 3856 (1989). [38] One of the most pedestrian devices is the "limited partnership," wherein a token principal having the favored personal attributes is purportedly ceded the exclusive "general" partnership powers, while given merely some fractional share of the aggregate equity. But, as this agency recently explained to the court [39]:

> The Commission is mindful, nonetheless, that an applicant may present a favorable formal structure on paper in order to gain a preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in (if not control) the applicant's decision-making process.
>
> In those instances, the Commission will disregard the applicant's formal ownership structure and treat the nominal passive owners (*i. e.*, non-voting stockholders or limited partners) as if they were active in the management of the applicant and consider them in any integration analysis. *See , e. g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1493-1497 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988) (table); *KIST Corp.*, 102 FCC 2d 288 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986) (table), *cert denied*, 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be disregarded."

52. As Southeast fairly submits, however, *Victory Media* and the Commission's even more recent decision in *Susan Mulkey* do tend to deemphasize the pre-organizational activities of the alleged "passive" investors in determining the legitimacy, *vel non*, of a limited partnership; these decisions consider such activities as "not necessarily dispositive" of actual management arrangements, *see Susan Mulkey* (at para. 5), and we must look instead to "the totality of record evidence" to ascertain *de facto* control. *Magdalene Gunden Partnership*, 3 FCC Rcd at 7186. One prominent factor that seems to have fallen into desuetude as a measure of *de facto* control is financial dominance. Noted recently, the Commission's former search for *de facto* control of an applicant (or a licensee) invariably proceeded from the Old Testament maximum that "[a] feast is made for laughter, and winemaketh merry:but money answereth all things." [40] So did the court's in *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937), when it held:

> It is well known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is the control of its finances . . .
>
> [T]he burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect, by any person within the classes proscribed by the statute.

*See also WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (D.C. Cir. 1958)(financial leverage can effect control); *cf. Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1567 (D.C. Cir. 1988) (same; evidentiary hearing

ordered). Yet, cases such as *Victory Media* and *Susan Mulkey* seem clearly to diminish the element of finances as the probable controlling factor, in both senses implied by the term.

53. The Board candidly acknowledges that the Commission's decisions in *Victory Media* and *Susan Mulkey* have engendered some new uncertainty as to the degree of scrutiny to be given to the lack of involvement of a purported "general" partner in organizing and directing that particular applicant. On the one hand, the pre-organizational passivity (or even nonexistence) of a purported "general" partner is "not necessarily dispositive," while on the other hand the Commission has adverted to all of these same pre-organizational indicia in its upgraded campaign against "sham" applications. *Compare Revision of Application for Construction Permit, supra,* 4 FCC Rcd at 3867 n.41. [41]

54. Upon a review of the totality of record evidence, we decline to overturn the I.D.'s conclusion that Southeast's ownership structure is a "sham." Putting aside the ineluctable question of whether Butler's alleged exclusive control over Southeast is "inherently incredible," *see Gamble-Skogmo v. FTC,* 211 F.2d 106, 115 (8th Cir. 1954), we find that a preponderance of the evidence refutes Southeast's claims as to Butler's *de facto* stewardship of Southeast, past, present, or probable future. The evidence discloses that Southeast counsel and only its "limited" partners launched, organized, and controlled the venture, while enlisting Butler later as a front. Indeed, Southeast's ten investor principals did not even recruit Butler personally; rather, its attorney reserved to himself the recruitment of some unknown "general" partner to fill his self-prescribed agenda. Incredibly, Butler has never even met eight of ten of her "limited" partners, *see* I.D., paras. 174-181, and none seriously checked on her references or questioned her aptitude for managing a new broadcast station (worth greatly in excess of $30 million) in a fiercely competitive radio market. *Id.,* para. 174. Indeed, Butler's actual ability to manage their potentially huge monetary stake seemed a matter almost of utter indifference to the many distant venturers. And, the hearing testimony of several of Southeast's "limited" partners indicated rather plainly that operational reliance on Butler was never genuinely contemplated by them. For instance, "limited" partner Baer's Chicago colleagues apparently assumed that Perry would be somewhat involved in managing the station, "because we knew him as an operator of broadcast stations." Tr. 2636-2639. And Davidoff, of the New York "limited" partners, also indicated his reliance on the "Perry Group." I.D., para. 175. Similarly, Courtney decided to invest because of Perry's "broadcast experience and judgment," id., at para. 176, while neither Katten, Grossman, Gerald Cohen, or Levin professed the slightest confidence in Butler's management credentials as an incentive for investing in Southeast. *See id.,* at paras. 176-181.

55. Although we must agree with Southeast that the Commission has yet to declare what minimum equity level it will accept as controlling, before it focuses upon the dog itself and not the tail, *see Religious Broadcasting Network,* 3 FCC Rcd 4085, 4106 n.37 (Rev. Bd. 1988)(requesting guidance on equity interests below the FCC's "noncognizable" level of 5%), we cannot concede that its written agreement is conclusive here. No reading of this complete hearing record would persuade any objective observer that Southeast was, is, or will be unilaterally controlled by its 4% "general" partner, and we concur wholeheartedly in the conclusion of the I.D. that Southeast should not benefit from its blatantly inverted ownership pyramid.

56. Finally, even if we disregarded the I.D.'s "sham" conclusion, we could not credit Butler's fulltime "integration" pledge without further examining her agreement with McDonald's to determine any management conflict. The I.D. reports, at paras. 126-127, that she and her husband are (through corporate ownership) the franchisees of at least two McDonald's restaurants. Although Butler indicated that she would abandon all of her day-to-day McDonald's responsibilities (but not her franchise ownership interests), *see id.,* at para. 131, we have in the past rejected such claims. Thus, in *Coastal Broadcasting Partners,* FCC 89R-61, released October 10, 1989, at para. 7, we just demanded that another McDonald's franchisee submit demonstrative evidence of no conflict because:

> [t]he Board was recently confronted with a similar factual situation in *Washoe Shoshone Broadcasting,* 3 FCC Rcd 3948 (Rev. Bd. 1988), where a 45% shareholder, who was also a McDonald's franchisee, claimed full-time integration credit at the new television broadcast facility proposed therein. We noted that that *Washoe* applicant principal was "bound by the clearest terms of his written franchise agreements with McDonald's, which agreements specifically require [him] to devote his fulltime efforts to the restaurant." Id., at 3952. We there specifically quoted the "standard" McDonald's License Agreement . . . noting that the Agreement required him to "diligently and fully exploit his rights in this license by personally devoting his best efforts and [he] shall devote his fulltime and best efforts to the operation of the Restaurant." *Id.* Because of the evident conflict in" commitments, the Board was unable to credit that" principal's promise to "integrate" full-time into" the operation of the proposed VHF television facility."

Since the record here is similarly deficient, and were the matter conceivably decisional, we would make the same demand as in *Coastal.*

57. *Financial Issue.* In 1978, the Commission relaxed its basic financial requirement, adopted pursuant to Section 308(b) of the Act, so that an applicant need now only show "reasonable assurance" of the resources to construct the facility and to operate its station for an initial ninety-day period, without resort to advertising revenues. *Financial Qualifications,* 69 FCC 2d 407 (1978). It had theretofore demanded reserve operating funds for a full inaugural year, *see id.,* at 408. Shortly thereafter, the Commission eliminated also its prior requirement that a broadcast application be accompanied by a detailed showing of projected costs and expenses, as well as evidence of the source(s) for the funds, and it then permitted instead a simple "yes" or "no" certification of such "reasonable assurance." *Revision of Form 301,* 50 RR 2d 381 (1981). [42]

58. Southeast's financial certification was executed by Gloria Butler, pursuant to counsel's assurance that the $600 thousand loan commitment letter he had drafted and secured from "limited" partner Davidoff's CMNY Capital was sufficient. *I. D.,* para. 227. However, because Butler had no personal familiarity with Davidoff or the scope of

CMNY's underlying assets, the ALJ found her certification to have been invalid for FCC purposes. *Id.*, Concls., paras. 30-31. Nonetheless, since he found no culpable intent to deceive on Butler's part, the ALJ did not disqualify Southeast under its basic financial issue, *see id.*, para. 33, and both Metroplex and the Bureau except to his failure to do so.

59. We believe that the ALJ might have properly disqualified Southeast for Butler's certification of "reasonable assurance" of financing, when she had no personal or substantive basis for her oath. We have consistently held that a financial certification premised entirely on the cursory assurances of another is an insufficient ground on which to affirmatively attest. As we stated in *Religious Broadcasting Network*, *supra*, 3 FCC Rcd at 4093, an applicant:

> may not for certification purposes rely simply upon the undocumented assurances of [another] that all of the necessary finances will be forthcoming, without acquiring firsthand knowledge of the sufficiency of the assets upon which their personal certification is based . . . . To permit such principals to certify to their financial resources on nothing but the undocumented assurances of other [individuals] would be to negate entirely the efficacy of the sworn certification itself.

While CMNY Capital is not merely an "individual," Butler had no serious loan discussions with CMNY, nor was she personally familiar with Davidoff, his CMNY partners, or even the "ball park" dimensions of the assets of CMNY, and she was therefore in no position to rely on its blanket commitment without further personal verification. Our view here has been recently reinforced by the Commission's opinion in *Susan Mulkey*, where it held that "uncorroborated oral assurances are not sufficient to resolve all questions concerning the validity of the financial certification." 4 FCC Rcd at 5522. However, since the *Mulkey* Commission did not immediately disqualify that subject applicant, but permitted an augmented financial showing, and inasmuch as CMNY appears to possess the necessary assets, *see I. D.*, para. 284, we will not here and now disqualify Southeast solely for its originally invalid financial certification. Nor does the record demonstrate an intent on the part of Butler to deceive, however legally insufficient her personal financial certification. *Cf. Northampton Media Associates*, 4 FCC Rcd 5517 (1989).

60. By the same token, we must disagree with the ALJ's subsequent conclusion that Southeast successfully met its hearing burden on the financial issue, even if we, *arguendo*, regard the CMNY loan commitment(s) as valid to the amount(s) indicated. [43] The *I. D.* indicates that "limited" partner Davidoff supplied Southeast with a letter pledging a CMNY loan of $600 thousand, *see id.*, para. 224, which amount it later increased to $900 thousand when the financial issue was added. *Id.*, para. 229. In estimating its construction and initial operating expenses, Southeast predicted a need for $828,050 to meet the Commission's basic financial requirement. *Id.* However, in addition to that amount, Southeast's retainer agreement with counsel provides that (*id.*, at para. 259):

> In the event the Limited Partnership is awarded the authorization to construct and operate the Fort Lauderdale FM station, at the time such grant becomes a final Order, Cohen & Berfield will receive Five Hundred Thousand ($500,000) Dollars as a bonus.

61. Despite that explicit provision, Southeast lately claims that counsel has informally agreed to withhold its demand for its $500 thousand payment until after the 90th day of operation, although neither Southeast nor its counsel have indicated the proposed length of any such gratuitous forbearance. In light of the fact that Southeast's obligation would plainly ripen under the express provision prior to the first three months of station operation, [44] we hold that it was required to demonstrate the ability to meet in full its contractural obligation to counsel. Moreover, we squarely reject Southeast's argument that it may blithely evade the Commission's 90-day financial standard by asserting that a critical start-up expense should not be considered if the applicant secures an agreement to simply defer payment until, say, the 91st day. Were we to accept this cynical proposition, it would eviscerate completely the Commission's basic financial standard and defeat its obvious rationale. We cannot permit a patent evasion of that standard by allowing an applicant to attest to its 90-day financial reserve, when it is keenly aware that it cannot timely meet a start-up expense already accruing, by the facile expedient of merely fudging the 90-day deadline. [45] Indeed, by Southeast's postulate an applicant could just defer *all* start-up expense pledges until the 91st day, and still legally qualify with absolutely *no* financing whatsoever. The purport of the Commission's 90-day standard is manifest, as we shall not credit counsel's self-serving offer of an evasive forbearance to forgive Southeast's immediate $500 thousand obligation, particularly when that figure constitutes fully 33% of its overall initial expenses. As it has not demonstrated a financial commitment that would cover both construction and operational reserves, as well its contractural legal bonus, it has failed its burden under this issue. *See , e. g., United Broadcasting Co.*, 53 RR 2d 57, 81 (1983) (financially disqualified applicant neglects, *inter alia*, adequate legal expense allocation).

62. *Summary*. The Board shall neither reverse nor modify the ALJ's determination that Southeast's limited partnership structure is a mummery projected purely to skew its otherwise feeble competitive stature. Its attempted subversion of our comparative process shall summon a result no different than the multitude of "sham" applicants routed in prior cases. Further, but for the fact that we grant the exceptions of Metroplex and the Bureau on the financial issue and find Southeast not basically qualified thereunder, and had we not affirmed the ALJ on the weightier matter of a WHYI renewal expectancy, we might likely remand this case for a further hearing on misrepresentation and/or real-party-interest issues against Southeast, stemming from its submission of a disingenuous limited partnership. *See , e. g., Royce International, supra*, FCC 89R-57, at para. 38; *Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987).

## CONCLUSION

63. Albeit, a remand is unnecessary inasmuch as we ratify the ALJ's award of a renewal expectancy to Metroplex for the meritorious broadcast record of WHYI. Though we have only a one-year window to judge by, its performance during that period reflects its ongoing responsiveness to local problems, needs and interests, and a highly favorable assessment from its home community. As we have also indicated, we shall abjure on the ALJ's interpretation of Section 317(a) of the Act regarding the station's solicitation and acceptance of multiple copies of playlist records, until a definitive pronouncement is made by the Commission on this mundane industry practice. And, although we find no actionable evidence of "payola" at WHYI, and therefore accord with the ALJ and the Bureau on that matter, we have commended to the licensee's attention the Commission's 1988 public notice on *Payola and Undisclosed Promotion* so that it might intensify its employee surveillance in conformity therewith, in the wake of the several unsettling disclosures on this hearing record.

64. Southeast has been exposed as both a "sham" and insufficiently qualified under the Commission's basic financial standard. Even had we found to the contrary on these two essential points, its application would still not unseat Metroplex from the subject FM frequency, because of the incumbent's entitlement to a substantial renewal expectancy. In refining the statutory dynamic at play in these comparative renewal contests, the *Central Florida* court had at an earlier phase of that litigation opined:

> The only legitimate fear which should move licensees is the fear of their own substandard performance, and that would be all to the public good.

*Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 61-62 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). Nothing about the WHYI record marks it as "substandard." As for the associated policy considerations, these were explicated more than a half-century ago when the court stated:

> It is not consistent with true public convenience, interest, or necessity, that meritorious stations . . . should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory power of the United States, and that the public convenience, interest, and necessity are the paramount considerations.

*Chicago Federation of Labor v. F. R. C.*, 41 F.2d 422, 423 (D.C. Cir. 1930). Where the Board has encountered substandard licensee performance, it has denied renewal to the incumbent and favored the challenger. *See , e. g., KQED, Inc.*, 3 FCC Rcd 2821 (Rev. Bd. 1988); *Mid - Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986) (renewal denied even after incumbent settles with challenger); *United Broadcasting Company, Inc.*, 94 FCC 2d 938 (Rev. Bd. 1983); *George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982) (AM and FM licenses lost) *recon. denied*, 93 FCC 2d 789 (Rev. Bd. 1983). Where the incumbent has been assayed superior, we have renewed. *See , e. g., Royce International, supra* ; *see also Intercontinental Radio, supra* ; *Tele - Broadcasters of California, Inc., supra.* On the record in the case at hand, the choice is not difficult, since Metroplex is overwhelmingly preferable to the "nothing competitor" [46] that has here coveted its Ft. Lauderdale FM radio license.

65. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike filed April 14, 1989 by Southeast Florida Broadcasting Limited Partnership IS DENIED; and that the unopposed Petitions for Leave to Amend filed August 14 and October 20, 1989 by Metroplex Communications, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and

66. IT IS FURTHER ORDERED, That the application of Southeast Florida Broadcasting Limited Partnership (File No. BPH-861030MH) IS DENIED, and the application of Metroplex Communications, Inc. (File No. BRH-860801YJ) for renewal of license of Station WHYI-FM, Ft. Lauderdale, Florida IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

## FOOTNOTES

[1] While the *I. D.* was released in January 1989, our action on the case has been continued at the request of the parties. *See* Consent Motions for Extension of Time, filed February 13 and March 8, 1989 by Southeast; granted by the Board on February 15 and March 9, 1989, respectively.

[2] 47 U.S.C. § 317(a).

[3] For reasons explained *infra*, the license term here under review is merely of a 1-yr. duration, commencing on December 20, 1985 and running to that same date in 1986.

[4] Metroplex (or its individual stockholders) also hold attributable media interests in 3 other radio stations and 1 TV station. *I. D.*, para. 11.

[5] The other media interests of Southeast's "limited" partners are reported in the *I. D.* as follows:

> Perry is President, a director, and 30% voting stockholder of the licensee of WADK(AM), Newport, Rhode Island. His wife, Jane N. Perry, holds an additional 30% and is also an officer and director. Courtney is an officer, director, and 40% voting stockholder. Perry is also President, a director, and 80% voting stockholder of the licensee of WOTB(FM), Middletown, Rhode Island. His wife is an officer. Courtney is an officer, director, and 20% voting sotckholder. Perry also owns a 5% limited partnership interest in a cable television system with approximately 2,700 subscribers on Martha's Vineyard, Massachusetts.

[6] The court has recently reaffirmed its decision in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), approving of licensing preferences based on race and gender. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *petition for certiorari pending sub nom. Metro Broadcasting, Inc. v. FCC*, No. 89-453 (filed Sept. 18, 1989).

[7] The Section 317 issue was added as here upon Southeast's (second) petition alleging improper conduct at WHYI. *See Memorandum Opinion and Order*, FCC 87M-1810, released July 31, 1987, modified, FCC 87M-2111, released September 8, 1987. Southeast complains that, despite having earlier indicated otherwise, the ALJ later placed the Section 317 burden of proof on Southeast, based upon the Board's decision in *Seven Hills Television Co.*, 2 FCC Rcd 6867, 6873-6874 (Rev. Bd. 1987), and the Commission's decision in *Calhoun County Broadcasting*, 57 RR 2d 641 (1985). Under 47 U.S.C. § 309(e), the burden of proof on an issued added pursuant to a litigant's "petition to enlarge" shall be "as determined by the Commission." However, the Board's burden of proof ruling in *Seven Hills* was specifically vacated without addressing the merits when that case was amicably settled, *see Order*, 4 FCC Rcd 4062, 4063 (1989) (per General Counsel), and we agree with Metroplex and the Bureau that the instant I.D. did not turn on a burden of proof question. Although Southeast was the party alleging "payola" and was responsible for the addition of the Section 317 issue, it offered little demonstrative evidence at all to substantiate its basic charge. And, its exceptions here do not suggest that all of the evidence relevant to this issue was not fully considered by the ALJ, or that a burden shift would alter the decision in the slightest degree. In view thereof, we find this exception nondecisional, agreeing in the main with the Bureau's position. *See* Bureau Reply at 3-4.

[8] Southeast Exceptions at 34.

[9] *Id.*, at 33.

[10] Metroplex further argues that Butler's financial certification is an independent ground for a disqualifying misrepresentation issue. Metroplex Exceptions at 16-26.

[11] Though conceding that its plaint is now moot, Metroplex also argues that the ALJ should not have allowed discovery on the matter of the station's record of compliance with FCC rules during the license term, in the absence of the addition of a more specifc compliance issue. *Id.*, at 7-15. Invoking the Commission's most recent *Character Policy Statement*, 102 FCC 2d 1179, 1232 (1986), Metroplex argues that such discovery "permits a free-roaming inquiry into possible licensee violations," even if any such previous violations have not been the subject of prior Commission attention. Acknowledging that this exception is now academic, we nevertheless address the matter for tentative guidance, pending future Commission clarification on this "first impression" dispute. The Board believes that since a renewal applicant literally "runs on its record," *United Broadcasting Co., Inc.*, 94 FCC 2d 938, 941 (Rev. Bd. 1983), *aff'd in pertinent part*, 100 FCC 2d 1574, 1577 (1985), and compliance is an important part of that record, *see Central Florida*, *supra*, a renewal applicant cannot but expose its compliance record to proper scrutiny. But, much like a petitioner-to-deny under Section 309(d), unless a challenger comes forward with *prima facie* evidence of a violation of the Act or FCC rules or policies, we share the concerns of Metroplex and the Bureau. Ordinarily, of course, discovery is not permitted unless a specific hearing issue is added upon the showing of a "significant and material" question of fact. *See , e. g., Phoenix Media Corp.*, 97 FCC 2d 916, 921 (Rev. Bd. 1984). This is "black letter" law; and, so far as we are aware, no exceptions to this general tenet exist. Discovery is not permitted routinely as a mechanism to produce, if possible, an issue not yet recognized. *Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *see Liberty Television*, 14 RR 2d 71, 74-75 & n.8 (Rev. Bd. 1968); *see also Folkways Broadcasting Co., Inc.*, 33 FCC 2d 813, 816 n.16 (Rev. Bd. 1972) (discovery is not to be used as a "fishing expedition"). We see no reason to deviate from this well-established procedural rule in the comparative renewal context. Henceforth, we believe that a renewal opponent, be it a competing applicant, a petitioner-to-deny, or our own Media Bureau, should meet the threshold burden of raising a justiciable question over licensee compliance, before broad discovery is initiated. While that threshold need not be high, since any probative evidence of a violation could raise serious questions, we agree that the Commission's long-standing policy should ordinarily prevail.

[2] *Seattle Public Schools*, *supra*, 4 FCC Rcd at 637. We have most recently applied these five criteria in *Royce International Broadcasting*, FCC 89R-57, released October 6, 1989 (*corrected*).

[13] The Commission is currently conducting an inquiry into the standards now applied in comparative renewal cases. Declaring that it "has long recognized that there are problems with the current comparative renewal process," it has asked for comments on policy revisions that would: (1) place heavier emphasis on compliance with regulatory rules than on program performance; and (2) create a "rebuttable presumption" of meritorious service by the incumbent, while shifting the rebuttal burden to the challenger, *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 6363 (1989) (*Third Further Notice*). We do not consider or apply those proposed standards, but proceed instead under currently established renewal policies and case precedent.

[14] *Remanded on other grounds sub nom. Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984).

[15] *See* Southeast Exceptions at 30.

[16] *Id.*, at 26.

[17] *Id.*, at 27.

[18] Metroplex Reply at 16.

[19] Referencing 47 U.S.C. § 326 (anticensorship provision), the court there observed:

> As to petitioners' First Amendment claims [in favor of quantitative criteria], their approach would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission. The Act provides broadcasters with broad programming discretion and prohibits the Commission from exercising the power of censorship.

[20] *But see Kaye - Smith Enterprises*, *supra*, 98 FCC at 684-685 (early morning programming credited upon showing of positive listener response).

[21] *Accord, Kaye - Smith Enterprises*, *supra*, 98 FCC 2d at 684; *Pillar of Fire*, *supra*, 99 FCC 2d at 1275; *Tele - Broadcasters of California, Inc.*, *supra*, 58 RR 2d at 227.

[22] Southeast Exceptions at 30.

[23] *See id.*, at 3-24.

[24] Amadeo also held the title of Assistant Program Director. *I. D.*, para. 319.

[25] The record company promoters specifically identified by Walker were:

> Jordon Zucker (A&M Records), Steve Jones (Atlantic), Rich Tartanico (CBS), Jeff Shane (Epic), Ed. Nuhfer (Warner Brothers), Margaret Ann Ronayne (Motown), Dave Prescott (Artista), George Luthin (Polygram), and Shirley Torlucci (RCA).

*I. D.*, at para. 407. None of the individuals incriminated by name in Walker's testimony was called as a witness, and thus his testimony stands unrebutted. It also appears that the ALJ accepted Walker's testimony as truthful. Because no exceptions have been filed in this regard, the Board will not disturb the findings of the *I. D.* as to Walker's acceptance (and/or distribution) of illicit narcotics, but we must stress that our acquiescence is not to be interpreted as a formal federal determination that the individuals named above are criminally culpable. Our acquiescence in the ALJ's findings is for the singular purpose of reviewing the exceptions under Section 317 of the Communications Act.

[26] In so interpreting Section 317, the ALJ considered two examples provided by Congress in adopting the statutory requirement. "Example (1)" of the 1960 House Report (reprinted at *I. D.*, Concls., para. 12) reads:

> A record distributor furnishes copies of records to a broadcast station or a disc jockey for broadcast purposes. No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes. Thus, should the record supplier furnish 50 or 100 copies of the same release, with an agreement by the station, express or implied, that the record will be used on a broadcast, an announcement would be required because consideration beyond the matter used on the broadcast was received.

In addition, "Example (7)" (reprinted *id.*, at para. 13) reads:

> A perfume manufacturer gives five dozen bottles to the producer of a giveaway show, some of which are to be identified and awarded to winners on the show, the remainder to be retained by the producer. An announcement is required since those bottles of perfume retained by the producer constitute payment for the identification.

Neither example is a precise analogue to the facts at bar.

[27] Southeast Exceptions at 9.

[28] *Id.*, at 6.

[29] *Id.*, at 7.

[30] Bureau Reply at 5-6.

[31] Metroplex Reply at 3-4.

[32] While Walker is no longer employed by Metroplex, Amadeo, who purloined the merchandise, and according to Walker also participated in the "sharing" of drugs with record promoters, apparently remains as Music Director of WHYI. Tr. of Oral Arg. at 4554.

[33] The Board has also reviewed the ALJ's rejection of Southeast's request for an employee misclassification issue, *see* Southeast Exceptions at 45-46, but we agree with the rationale contained in the ALJ's *Memorandum Opinion and Order*, FCC 87M-1301, released June 8, 1987, as to why Southeast had failed to fuel a new issue. *See also* Bureau Reply at 9 (opinion of former receptionist insufficient to raise issue).

[34] *See* Southeast Exceptions at 35.

[35] *Id.*, at 36.

[36] *Id.*, at 44-45.

[37] *See* 47 U.S.C. § 311(d)(3), as amended by Public Law 97-259, 96 Stat 1087, 1095, Sept 13, 1982. Prior to that 1982 revision, the statute precluded settlement amounts in excess of the legitimate and prudent application costs. In the wake of that revision, multimillion dollar settlements are quotidian, *see, e. g., RKO General Inc.*, 3 FCC Rcd 5057 (1988) ($324 million settlement in KHJ case).

[38] In that 1989 *Application Form* revision, the Commission observed:

> We have been faced with an increasing number of cases in which real parties-in-interest seek construction permits through "sham" corporate or partnership applicants. In *KIST Corp.*, for example, we affirmed the Review Board's denial of an integration credit to an applicant where 95% of its stock was held by a minority female. The Board found she was not the true and actual owner for integration purposes. Rather, it found the 5% stockholder, who made a gift of 95% interest in the corporation to the minority female, guaranteed the bank loan and provided $70,000 to prosecute the application, was the real owner for integration purposes. Similarly, integration preferences have been denied in several other cases in which it was determined that an applicant's organizational structure was erected to take advantage of a comparative preference. While the *KIST* 5% shareholder holds an attributable interest and would therefore be identified in a Form 301 application, a 4% shareholder, who need not currently be identified, could easily perpetrate the same scheme.
>
> There is the potential for similar abuse in limited partnership arrangements. In *Louisiana Super Communications Ltd.*, for example, the Review Board discounted an integration preference to a female "general" partner where it became evident that the "limited" partner would have complete control over the operation and management of the partnership. This type of "sham" application often is difficult to detect under current filing requirements. An applicant need not identify a "limited" partner if it certifies that the "limited" partner will not be involved in any material respect in the management or operation of the proposed station. Once the applicant has so certified, the Commission does not generally inquire into, or have readily available information that would suggest the need to inquire into, the veracity of this statement. Moreover, little information is available from the application to enable competing applicants to challenge the certification.

4 FCC Rcd at 3856 (footnotes omitted).

[39] Brief for Appellee at 6-7 in *Spectron Broadcasting Corp. v. FCC*, 858 F.2d 744 (D.C. Cir. 1988) (Table), *cert. denied*, 109 S. Ct. 1140 (1989).

[40] *Seven Hills Television Co.*, 2 FCC Rcd 6867, 6880 (Rev. Bd. 1987) (quoting Ecclesiastes 10:19).

[41] In that footnote, the Commission reviewed the hallmarks of some of its previous "sham" applicants and it highlighted the following characteristics as to several of them, *e. g.*:

> The limited partner contributed 85% of the equity, petitioned the Commission in his own name to have the channel allocated, hired the consulting firm which prepared the application, signed the contracts for equipment and preparation of the application, hired legal counsel, obtained the transmitter site, advised the general partner on all application decisions (which advice was followed in

every instance), prepared the financial plan, entered into a bank agreement to provide the financing, and represented the partnership in negotiations with other applicants. *See also Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978) (although integrated general partners claimed an integration credit was warranted, all financing was provided by the third partner; thus, true and actual control rested with that partner); *Payne Communications Inc.*, 1 FCC Rcd 1052, 1058, 1060 (Rev. Bd. 1986) (integration credit denied where limited partner, *inter alia*, employed a research agency to find general partners with favorable qualitative enhancements for his application); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988) (limited partner provided 99% of the financing and paid for legal counsel who prepared the application and retained engineering consultant); *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4097-98 (Rev. Bd. 1988), *reconsideration granted on other grounds, 3 FCC Rcd 6216* (Rev. Bd. 1988) (general partners materialized shortly before the application was filed, limited partner held a 90% ownership interest and provided every major element of the application including financing, attorneys and its engineer).

Clearly, many of the identical circumstances obtain with respect to Southeast.

[42] As we have previously remarked, the Commission's revised "certification procedure was an "incomplete success," *see Certification of Financial Qualifications*, 62 RR 2d 638 (1987) (Commission notes large volume of false certifications), and it has just recently been compelled to revert to its prior requirement of a detailed financial showing. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3858-3860 (1989).

[43] Davidoff is only one of three CMNY Capital partners, and the evidence reflects no consultation with, or approval of, his two CMNY partners regarding Davidoff's unilateral commitment to Southeast. *See I.D.*, paras. 270, 274, 280-281.

[44] In a transpicuous exercise of post-hoc ratiocination, Southeast lately contends that the $500 thousand bonus obligation will not ripen until after the station has been operating for 3 months, because Southeast must apply for a license to cover its Construction Permit under Section 319 of the Act. However, not only does the language of the provision trigger immediately upon Southeast's receipt of a "final Order" to "construct and operate the Ft. Lauderdale FM station," its grant could become "final" 40 days after a Board decision, or a Commission decision if the Board's decision is appealed. 47 C.F.R. §1.102(a). *See also* 47 U.S.C. § 402(b)-(c); § 408. Its arguments in this regard are unalloyed sophistry.

[45] That is not to say that an applicant may not enter into legitimate agreements to minimize start-up costs by, for example, negotiating with a supplier to satisfy an obligation over a period of months or years, or to make only interest payments for some initial period of time. Prudent and *bona fide* avoidance of initial capital costs would be readily permissible. But, that is not the case with Southeast, whose binding agreement calls for payment in full at the very outset, with only a gratuitous parole forbearance by counsel, who could hardly intimate otherwise without tipping his own canoe. Because Southeast's agreement does not provide for any extended period of out-of-pocket payoff to counsel, its citation to *Muncie Broadcasting Corp.*, 54 RR 2d 42, 46-47 (1983), *on remand, Bendel Broadcasting Corp., 98* FCC 2d 164 (1984), is inapposite.

[46] *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 705 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 926 (1975).

**Before the**
**Federal Communications Commission**
**Washington, D. C. 20554**

**MM Docket No. 88-362**

In re Applications of

| | |
|---|---|
| DON H. BARDEN | File No. BPH-860507PR |
| GRAND RAPIDS 98, INC | File No. BPH-860507PS |
| HAITH BROADCASTING CORPORATION | File No. BPH-860507PT |

For a Construction Permit for a
New FM Station on Channel 255A
in Grand Rapids, Michigan

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 7, 1989; Released: November 17, 1989**

By the Review Board : MARINO (CHAIRMAN), BLUMENTHAL, and ESBENSEN.

1. In his *Initial Decision*, 4 FCC Rcd 7043 (1989), Administrative Law Judge Joseph Chachkin (ALJ) determined that the three remaining applicants herein were fully qualified to be Commission licensees, but concluded on a comparative basis that Haith Broadcasting Corporation (Haith) was the preferred applicant.

2. Now before the Review Board is the applicants' Joint Petition for Approval of Settlement Agreement filed October 30, 1989. Therein, Haith proposes to pay each remaining applicant (Don H. Barden and Grand Rapids 98, Inc.) the sum of $35,000 in consideration of dismissal of their respective applications.

3. Pursuant to Section 73.3525 of the Commission's Rules, 47 C.F.R. § 73.3525 (which implements Section 311(c) of the Communications Act, as amended, 47 U.S.C. § 311(c)), the parties have submitted their proposed settlement agreement, accompanied by the required declarations under penalty of perjury, indicating that their respective applications were filed in good faith and not for the purposes of reaching or carrying out a settlement agreement. The parties also urge that the proposed settlement agreement will be in the public interest, will conserve the resources of the Commission, and will expedite initiation of new FM broadcast service at Grand Rapids, Michigan. In light of the foregoing, and in the absence of any basic qualifying issues extant against any party, we find no impediment to the amicable settlement of this proceeding.

4. However, this proceeding may not be terminated at this juncture. On October 27, 1989, Richard Culpepper (Culpepper), a non-party, filed a document entitled "Exceptions" with the Board. Culpepper had originally filed an application for the frequency at issue here on May 5, 1989 (File No. BPH- 860505MQ). However, this application was returned as "unacceptable for tender" by the Mass Media Bureau (Bureau) on April 15, 1988. In returning Culpepper's application, the Bureau noted:

> Review of your application reveals that the application was inadvertently accepted for tender. We have found it not acceptable for tender since the legal boundaries of the community of license are not clearly and legibly defined on the contour map. This information is required pursuant to Item 4g, Appendix D, *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985). The *Report and Order* indicates that the failure to provide this information will result in the application being returned as unacceptable for tender.

On May 4, 1988, Culpepper apparently filed a petition for reconsideration of this action. On August 10, 1988, the *Hearing Designation Order* in this proceeding was released, *sans* Culpepper as a party. On August 17, 1988, however, Culpepper filed an application for review with the Commission. To date, this application for review has not been acted upon.

5. Because Culpepper is a non-party to this proceeding, his "Exceptions" will be dismissed. *See Golden State Broadcasting Corp.*, 92 FCC 2d 761 (Rev. Bd. 1982). However, while we approve the instant settlement agreement, termination must await action on Culpepper's pending application for review.

6. ACCORDINGLY, IT IS ORDERED, That the "Exceptions" filed by Richard Culpepper on October 27, 1989, ARE DISMISSED; and,

7. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Settlement Agreement filed by Don H. Barden, Grand Rapids 98, Inc., and Haith Broadcasting Corporation, on October 30, 1989, IS GRANTED; that the Settlement Agreement IS APPROVED; that the applications of Don H. Barden (File No. BPH-860507PR) and Grand Rapids 98, Inc. (File No. BPH-860507PS) ARE DISMISSED; and that the application of Haith Broadcasting Corporation (File No. BPH-860507PT) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

UNITED STATES LIBERIA RADIO CORPORATION — File No. ENF-90-02

Application for modification of licenses for Stations WQA27, WQB20, WQB23, WQB35, WQB25, WQB39, and WQB29 in the International Fixed Public Radiocommunications Services

**ORDER AND NOTICE OF APPARENT LIABILITY**

**Adopted: November 13, 1989; Released: November 17, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On March 8, 1988, the United States Liberia Radio Corporation ("USLRC") filed an application pursuant to Section 308 of the Communications Act, 47 U.S.C. § 308, and Section 23.50 of the Commission's Rules, 47 C.F.R. § 23.50, for modification of the licenses for the above-captioned stations in the International Fixed Public Radiocommunications Services. USLRC stated that it had, without prior Commission authorization, already replaced certain transmitting and receiving equipment authorized by its present licenses with newer equipment that is technically more sophisticated. It now seeks *nunc pro tunc* authorization for these changes.[1]

2. In support of its *nunc pro tunc* request, USLRC asserts that the equipment changes will allow it to use technological advances to provide higher quality service to its customers. It also contends that the updated equipment will pose less risk of harmful interference with other operations. No comments or petitions to deny USLRC's application were filed during the pleading period after the application was placed on public notice.

3. Section 308 of the Communications Act and the Commission's Rules thereunder require licensees to obtain prior authorization from the Commission for such equipment changes. In the exhibits accompanying its application, USLRC has "acknowledge[d] that it erred in installing the updated transmitting and receiving equipment without first seeking Commission authorization." As we have said before under similar circumstances, the determination whether to allow equipment or operating changes "is ours alone to make, and we cannot condone unilateral, unlawful actions by licensees."[2]

4. We therefore find that USLRC is apparently liable for forfeiture [3] for violation of Section 308 of the Communications Act. Although the unlawful modification of transmitting and receiving facilities is a serious violation, we take into consideration USLRC's voluntary admission of its failure to obtain prior authorization. We also note that no comments or petitions to deny the application have been filed. Taking these factors into account, we propose imposition of a forfeiture in the amount of $1000 against USLRC.[4]

5. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that USLRC is apparently liable for a forfeiture in the amount of $1000 for violating Section 308 of the Act.

6. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that USLRC shall within thirty days of the date of this notice pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, [5] or shall file a response showing why the proposed forfeiture should not be imposed or should be reduced. If the forfeiture is not paid, the response should include supporting evidence sufficient to rebut the tentative conclusions outlined in this notice.

7. IT IS FURTHER ORDERED that a copy of this notice shall be sent by certified mail, return receipt requested, to the United States Liberia Radio Corporation, 1200 Firestone Parkway, Akron, OH 44317.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**FOOTNOTES**

[1] USLRC has also requested a waiver of the Commission's Rules requiring operation of these facilities by a licensed operator. On June 30, 1988, the Chief, International Facilities Division, Common Carrier Bureau, granted temporary authority for USLRC to use a non-licensed operator. This temporary authority has been extended to May 1, 1990.

[2] In re McCaw Communications Companies, Inc., 4 FCC Rcd 547 (1989).

[3] *See* 47 C.F.R. § 1.80.

[4] The Chief, International Facilities Division, Common Carrier Bureau, will subsequently issue a Memorandum Opinion Order and Authorization that will address whether authority will be granted for the equipment and operator changes.

[5] Such forfeiture should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, Federal Communications Commission, Box 19209, Washington, D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington, D.C 20554.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board — **CC Docket No. 80-286**

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands — **CC Docket No. 83-1376**

**ORDER**

**Adopted: November 2, 1989; Released: November 17, 1989**

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), we hereby appoint Commissioner Andrew C. Barrett to be a member of the Federal-State Joint Boards in CC Docket Nos. 80-286 and 83-1376. Henceforth a copy of all filings in these proceedings shall be served on Commissioner Barrett at the following address:

The Honorable Andrew C. Barrett, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
Telephone (202) 632-7117

2. ACCORDINGLY, IT IS ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. § 410(c), that Andrew C. Barrett shall serve as a member of the Joint Boards established in CC Docket Nos. 80-286 and 83-1376.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re request of

DIGINET, INC. File No. MW-2654
For extension of time

## ORDER

**Adopted: November 13, 1989; Released: November 17, 1989**

By the Chief, Land Mobile and Microwave Division:

1. Diginet, Inc. (Diginet) has requested a six month extension of our waiver[1] of Section 94.9(b)(1) of the Commission's Rules, 47 C.F.R. § 94.9(b)(1). The waiver permitted it to lease the excess capacity on its private operational-fixed microwave system linking Spokane and Plymouth, Washington, to transmit common carrier communications for one year while the carrier, MCI, constructed its own common carrier link between the cities. Due to delays in reaching agreement on financing, start of construction was delayed five months, and completion of construction was pushed back. Diginet requests an extension until May 16, 1990, while MCI completes construction.

2. The extension requested is for a short period of time, and Diginet indicates that it will not request a further extension. Further, MCI, the common carrier involved, has made substantial progress in construction, and is making a good faith effort to complete work within a short time. Under the circumstances, we believe that an extension of time is warranted.

3. THEREFORE, Northwest Pipeline Coporation's waiver of Section 94.9(b)(1) IS EXTENDED for six months, until May 16, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

**FOOTNOTE**

[1] *Northwest Pipeline Corporation*, 3 FCC Rcd 6690 (1988). Diginet is a subsidiary of Northwest Pipeline Corporation and is the licensee of its private microwave carrier systems.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-510**

In the Matter of

Amendment of Section 73.202(b), RM-6860
able of Allotments,
FM Broadcast Stations.
(Beeville, Texas)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 31, 1989; Released: November 17, 1989**

By the Chief, Allocations Branch:

1. Lovelace Associates, Inc. (petitioner), licensee of Station KIBL-FM, Channel 285A, Beeville, Texas, has filed a petition for rule making requesting the substitution of Channel 289C3 for Channel 285A at Beeville, and the modification of its license for Station KIBL-FM to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 289C3 can be allotted to Beeville in compliance with the Commission's minimum separation requirements with a site restriction of 9.8 kilometers (6.1 miles) northwest of the city.[1] The site restriction is necessary in order to avoid short spacings to Station KJKC(FM), Channel 288A, Portland, Texas, and a pending proposal for Channel 291C2 at Refugio, Texas.[2]

3. Since Beeville is located within 320 kilometers (199 miles) of the U.S.-Mexican border, the proposal requires concurrence by the Mexican government.

4. As requested, we shall propose to modify the license for Station KIBL-FM at Beeville to specify operation on Channel 289C3 in lieu of Channel 285A. However, since the proposal is for a non-adjacent upgrade at Beeville, the Commission's policy requires consideration of competing expressions of interest. Therefore, in accordance with Section 1.420(g) of the Commission's Rules, if there is a competing expression of interest in Channel 289C3 at Beeville, the license of Station KIBL-FM may not be modified herein unless there is an additional equivalent class channel available at Beeville.

5. In view of the fact that Beeville, Texas, could receive an expanded FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Beeville, Texas | 250A, 285A | 250C2, [3] 289C3 |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Larry G. Fuss
P. O. Box 159
Fayetteville, GA 30214
(Consultant to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] The restricted site coordinates are 28-27-00 and 97-49-51.

[2] *See* MM Docket No. 89-29, 4 FCC Rcd 1627 (1989).

[3] Currently pending before the Commission is a proposal to substitute Channel 250C2 for Channel 250A at Beeville, Texas. *See* 4 FCC Rcd 1250 (1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-511**

In the Matter of

Amendment of Section 73.202(b), RM-6941
Table of Allotments,
FM Broadcast Stations.
(Shawano, Wisconsin)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 17, 1989**

By the Chief, Allocations Branch:

1. Wheeler Broadcasting, Incorporated (petitioner), licensee of Station WOWN(FM), Channel 257A at Shawano, Wisconsin, has filed a petition for rule making seeking the substitution of Channel 257C3 for Channel 257A at Shawano, and the modification of its station's license to specify operation on the higher powered channel. The proposal could provide the community with its first expanded FM service. Petitioner states that upon grant, it will immediately apply for the higher powered channel.

2. We believe the proposal warrants consideration. Channel 257C3 can be allotted to Shawano in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] As requested, we shall propose to modify the license of Station WOWN(FM) to specify operation on the higher class co-channel, Channel 257C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Shawano.

3. In view of the fact that the area surrounding Shawano, Wisconsin, could receive additional wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Shawano, Wisconsin | 257A | 257C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lyle Robert Evans
Broadcast Consultant
124 North Main Street
Mayville, Wisconsin 53050
(Consultant to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

### APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] Petitioner specified a site located 17.6 kilometers (10.9 miles) northeast of Shawano, at coordinates 44-50-52 and 88-24-28.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-512**

In the Matter of

Amendment of Section 73.202(b), RM-6973
Table of Allotments,
FM Broadcast Stations.
(Fairfield and Norwood, Ohio)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 30, 1989; Released: November 17, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WLLT, Inc. (petitioner) requesting the reallotment of Channel 235B from Fairfield, Ohio, to Norwood, Ohio, and the modification of its license for Station WOFX accordingly.

2. Petitioner states that the reallotment of its channel would serve the public interest since it would provide Norwood with its first local service while Fairfield would retain local service from Station WCNW(AM). Further, it states that no change in transmitter site is required since the station will be able to place the required 3.16 mV/m, 70 dBu contour over Norwood from its present site.[1]

3. We believe the public interest would be served by soliciting comments on the proposed reallotment of Channel 235B from Fairfield to Norwood, Ohio, as the community's first local FM service. As requested, we also propose to modify the license of Station WOFX to specify Norwood, Ohio, as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Norwood. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989).

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Fairfield, Ohio | 235B | -- |
| Norwood, Ohio | -- | 235B |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert L. Olender, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 700
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-18-41 and West Longitude 84-30-45.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-513**

In the Matter of

Amendment of Section 73.202(b), RM-6897
Table of Allotments,
FM Broadcast Stations.
(Dublin, Georgia)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 30, 1989; Released: November 17, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of State Broadcasting Company, Inc. (petitioner), requesting the substitution of Channel 240C1 for Channel 240C2 at Dublin, Georgia, and modification of its license for Station WQZY(FM) to specify operation on the higher powered channel.[1]

2. A staff engineering analysis has determined that Channel 240C1 can be allotted to Dublin at the petitioner's specified site[2] with a site restriction of 37.2 kilometers (23.1 miles) east of the community, in compliance with the minimum distance separation requirements of the Commission's Rules.

3. As requested, we shall propose to modify the license of Station WQZY(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 240C1 at Dublin, nor require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. In view of the fact that Dublin could expand its service area, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Dublin, Georgia | 224A, 240C2 | 224A, 240C1 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lawrence J. Bernard, Jr.
Ward & Mendelsohn, P.C.
1100 17th Street, N.W., Suite 900
Washington, D.C. 20036
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

### APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] WQZY(FM) currently operates on Channel 240A at Dublin. However, its license was modified by *Report and Order* in MM Docket No. 88-76, 4 FCC Rcd 3594 (1989), to specify operation on Channel 240C2.

[2] Coordinates at the petitioner's specified site are North Latitude 32-39-51 and West Longitude 82-32-18.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-514**

In the Matter of

Amendment of Section 73.202(b), RM-6978
Table of Allotments,
FM Broadcast Stations.
(Gardner, Illinois)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 30, 1989; Released: November 17, 1989**

By the Chief, Allocations Branch:

1. At the request of David B. Knoll (petitioner), the Commission considers herein a petition for rule making seeking the allotment of Channel 273A to Gardner, Illinois, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. An engineering analysis reveals that Channel 273A at Gardner conflicts with a proposal for the use of Channel 273A at Seneca, Illinois. Thus, we sought an alternate channel for Gardner. As a result, we have determined that Channel 293A can be allotted to Gardner in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction 2.5 kilometers (1.5 miles) east of the city.[1]

3. In view of the fact that Gardner could receive a first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Gardner, Illinois | -- | 293A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

David B. Knoll
1305 Smokey Row Lane
Carmel, Indiana 46032

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 41-10-49 and West Longitude 88-16-52.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-515**

In the Matter of

Amendment of Section 73.202(b), RM-6898
Table of Allotments,
FM Broadcast Stations.
(Clarkesville, Georgia)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 30, 1989; Released: November 17, 1989**

By the Chief, Allocations Branch:

1. Clara Morris Martin, permittee of a new FM station at Clarkesville, Georgia, has filed a petition for rule making seeking the substitution of Channel 275C3 for Channel 275A and modification of her construction permit to specify the higher class channel. Petitioner states her intention to apply for the channel, if allotted.

2. A staff engineering analysis reveals that Channel 275C3 can be substituted for Channel 275A at Clarkesville in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 12.3 kilometers (7.7 miles) south.[1]

3. As requested, we shall propose to modify the construction permit (BPH-871026ML) at Clarkesville, Georgia, to specify operation on Channel 275C3 in lieu of Channel 275A in accordance with Section 1.420(g) of the Commission's Rules. We shall not accept competing expressions of interest nor require the petitioner to demonstrate the availability of an additional equivalent channel at Clarkesville.

4. In view of the fact that Clarkesville could expand its coverage area the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Clarkesville, Georgia | 275A | 275C3 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 8, 1990,** and reply comments on or before **January 23, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Christopher J. Reynolds
Audrey L. Allison
Peper, Martin, Jensen, Maichel and Hetlage
1875 Eye Street, N.W., Suite 1200
Washington, D.C. 20006
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 34-30-00 and West Longitude 83-30-00.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 15, 1989**

Commissioner Patricia Diaz Dennis releases concurring statement in a Report, FCC 88-340, released August 3, 1989, 4 FCC Rcd 6711.

**CONCURRING STATEMENT**
**OF**
**COMMISSIONER PATRICIA DIAZ DENNIS**

In Re: Recommendation to Congress Concerning Compulsory License for Cable Retransmission of Broadcast Stations.

I address the cable compulsory copyright license reluctantly. Congress, the Copyright Office and the Copyright Royalty Tribunal are better equipped than the FCC to resolve copyright law issues.

The Commission can play a constructive (if limited) role, however, in considering the possible effects of the compulsory license. Because promoting diversity of programming is a bedrock goal of the Communications Act, we may have some expertise in determining how the compulsory license affects that goal and the programming choices available to the public. The Commission also has some expertise in analyzing the probable overall effects of repeal or change in the compulsory license on the broadcasting and cable industries.

The compulsory license may have served a useful purpose in helping cable get off the ground (or in the ground) in major markets. With more than 80 percent of American homes now having access to cable service, it could be deemed a success. By this measure, the compulsory license is no longer necessary. Cable has grown up and can now take care of itself in copyright license negotiations. Negotiated copyright royalties are the norm in the entertainment industry. Television broadcasters negotiate with copyright holders. Cable services (such as HBO) bargain for copyright licenses for their programs and then license the programming to cable systems. The elimination of the compulsory license is reasonably feasible. I, therefore, concur in the Commission's recommendation that Congress *consider* repeal.

I agree with Commissioner Quello that, if Congress adopts must-carry rules for local broadcast signals, Congress should retain the compulsory license for those signals cable systems are required to carry. In the absence of must-carry, however, no principled reason exists to distinguish local from distant signals for purposes of the compulsory license.

By this limited concurrence, I do not adopt the rest of the analysis and rationale the Commission urges on Congress. Specifically, I do not presuppose the existence of some abstract "full" copyright model. Copyright is what Congress says it is. Congress can and does mold copyright law to achieve a variety of public policies. Through copyright, it "seeks a balance among the free flow of information, competition in the marketplace, and the stimulation of technological change." Berne Convention Implementation Act of 1988 ("BCIA"), House Rept. 100-690, p.21 (May 6, 1988). No concept of pure copyright protection exists somewhere to guide Congress. " The Constitution does not establish copyrights, but simply provides that Congress has the power to grant such rights if and as it thinks best." *Id.* at 22.

Nothing is inherently wrong with the compulsory copyright license for cable if Congress wants to keep it. Nor is it an aberration. Other countries have similar compulsory licenses. Article 11 bis of the Berne Convention, which the U.S. just joined, specifically authorizes broadcasting compulsory licenses, including the cable compulsory license. Compulsory licenses can serve useful purposes, as Congress implicitly found last year when it retained the compulsory license to insure the availability of the existing quantity of musical recordings for jukeboxes. BCIA, Section 4(a) (4).

I also part company with the Commission's analysis to the extent it implies the existence of the proverbially non-existent "free lunch." If local television stations are to reap income from cable systems which pay them for copyright licenses to retransmit local or distant signals, these broadcasters will likely have to pay more to copyright owners when they receive their copyright license to obtain the right to re-license. For this reason, cable licensing royalties will not be found money to the broadcasters. Broadcasters may, in some cases, end up paying more for their package of copyright rights without finding enough cable systems to pay them enough royalties to break even.

Noticeably absent from the Commission's discussion is mention of the theory of "economic rent." If the desired result of repeal is to place more money in the hands of producers of programming, the theory, as I understand it, does not ineluctably mean that they will neccessarily produce more or better shows. Bill Cosby already earns enough to give him the incentive to get out of bed and go to the studio. More millions will not incent him to produce shows he does not already make.

Finally, the Commission appears to advocate repeal of the compulsory license to tilt the legal landscape (or "playing field," to use the current sport jargon) to "balance" the rights of broadcasters. This may well be the short run result. In the long run, however, broadcasters may regret the end of compulsory license, because it may only hasten the further weaning of cable from relying on broadcasters. Already cable is demonstrating a capability to program their channels themselves. At present, the programming on local broadcast stations is the most popular with cable subscribers. *See Broadcasting*, July 31 1989, p.51. But this could change. Broadcasters should think twice before asking Congress to change the status quo. A world without the compulsory license may not live up to its billings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GTE SPACENET CORPORATION — File No. I-T-C-89-140

For Section 214 Authority to Establish and Operate Channels of Communication Between a Location in Florida and a Point in the Bahamas

**ORDER AND AUTHORIZATION**

**Adopted: October 31, 1989; Released: November 17, 1989**

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned application filed by GTE Spacenet Corporation (GTE) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish two-way channels of communication for the provision of C-band links between a location in Florida and a location in the Bahamas, utilizing an authorized GTE Spacenet domestic communications satellite. The application was placed on public notice and no comments were received.

2. In the instant application, GTE requests authority to use its commercial domestic satellite system to provide two-way channels of communications between Miami and Grand Exuma Island, Bahamas to the U.S. Customs Service in connection with the CARIBALL project. GTE will provide the U.S. Customs Service with C-band capacity which will be used to provide voice and data services. GTE states that the capacity will be made available over the following satellites: Spacenet I at $120^0$W.L.; Spacenet II at $69^0$W.L.; and Spacenet III at $87^0$W.L.

3. GTE notes that the proposed service is not subject to the provisions of the INTELSAT Agreement and cites a waiver from the Department of State which certifies that the proposed service is solely for national security.[1] Although the letter from the Department of State is dated November 25, 1987, GTE states that its customer has represented that no substantive changes have occurred with respect to the nature of the service that would alter the Department of State's determination with respect to national security. We have also confirmed with the Department of State that its November 25, 1987 letter still represents its determination with respect to the proposed service.

4. In light of these circumstances, we find that a grant of GTE's application will be in the public interest. The Commission has previously found that the public interest would be served by the authorization of a domestic satellite operator to provide space segment capacity to the U.S. Customs Service for service between the U.S. and the Bahamas in connection with the war on drugs. In that instance, the State Department also certified that the communications were solely for national security purposes.[2] The instant application appears to be part of or related to the same project. Accordingly, we find that its grant will serve the public interest. In addition, since the application proposes to provide service solely for national security purposes, it is not subject to the provisions of the INTELSAT Agreement which generally require consultation whenever non-INTELSAT facilities are used for international public telecommunications services. [3]

5. Accordingly, IT IS ORDERED that the application of GTE Spacenet, File No. I-T-C-89-140, IS GRANTED and GTE Spacenet is authorized to establish two-way channels of communication between Miami, Florida and Grand Exuma Island, Bahamas via an appropriate GTE Spacenet satellite to provide service to the U.S. Customs Service.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] Letter dated November 25, 1987 from Diana Lady Dougan, U.S. Coordinator and Director, Department of State to Commissioner William von Raab, Department of the Treasury, U.S. Customs Service.

[2] *See* GE American Communications, Inc., 4 FCC Rcd 6351 (1989).

[3] Since the INTELSAT Agreement does not apply to the proposed service, we need not consider whether the subject application complies with the Commission's Transborder policy. The Commission's Transborder policy concerns the use of domestic satellites to provide international public telecommunications service subject to the consultation requirement contained in Article XIV(d) of the INTELSAT Agreement.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TELEGRAPH SERVICE CORPORATION — File No. I-T-C-89-126

Application for authority to resell services of other carriers to provide one-way telegram, telex and facsimile service, from the contiguous United States to Mexico.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: November 7, 1989; Released: November 17, 1989**

By the Chief, International Facilities Division:

1. On June 12, 1989, Telegraph Service Corp. (TSC) filed the above-captioned application requesting authority, pursuant to Section 214 of the Communications Act of 1934, to resell the services of other common carriers to provide one-way facsimile, as well as telex and telegram services from the United States to Mexico. The application was placed on public notice on June 28, 1989. No comments were received.

2. TSC is a California Corporation. By the instant application, TSC proposes to offer international facsimile, telex and telegram service between the U.S. and Mexico through the resale of the services of underlying common carriers authorized to provide IMTS and non-IMTS services. TSC states that additional entry into the U.S. - Mexico market will promote lower prices, generate better service, increase customer choices and stimulate more efficient utilization of telecommunications resources.

3. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international telegram, telex and facsimile service by TSC from the U.S to Mexico.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-89-126 IS GRANTED, and TSC is authorized to:

a. provide international facsimile service by the resale of the International Message Telephone Service set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI Communications Corp. Tariff FCC No. 1, and US Sprint's Tariffs FCC Nos. 1 and 2, between the contiguous U.S. and Mexico;

b. provide international telex service by the resale of international telex service set forth in Western Union Corporation's Tariff FCC No. 283, and RCA Global Communications, Inc.'s Tariff FCC No. 90, between the contiguous U.S. and Mexico;

c. provide international telegram service by the resale of public message telegram service set forth in Western Union Corporation's Tariff FCC No. 255, between the contiguous United States and Mexico; and

d. provide international telex and telegraph services by the resale of international telex and telegraph services set forth in Western Union International's Tariffs FCC Nos. 5 and 12, respectively, between the contiguous United States and Mexico.

6. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commissions Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

9. IT IS FURTHER ORDERED that TSC is limited, under this order, to the provision of common carrier services only. The payments that TSC describes that it will receive in its draft tariff are payments solely for the provision of its resale services. Nothing in this authorization or in TSC'S application should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. This order is issued under Section 0.291 of the Commission's rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

**FOOTNOTES**

[1] *See* Teltec Saving Communications Co., Mimco No. 3548, n. 2 (released April 4, 1986).

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

TELECOM BROADCASTING, INC. CSG-89-095-ML

Application for authority to modify its license for a five-meter C-band transmit/receive transportable satellite earth station (Call Sign E890681) for the provision of video programming between the United States and Canada, Mexico, Central America and Caribbean points

TELEVISA, S.A. CSG-89-100-P/L

Application for authority to construct and operate a 3.6-meter Ku-band transmit/receive earth station in Los Angeles, California for the provision of voice and data services between the United States and its offices in Mexico City

YALE SECURITY CSG-89-118-ML
CSG-89-119-ML
CSG-89-120-ML

Applications for authority to modify its licenses for 1.8, 2.4 and 3.7-meter fixed Ku-band transmit/receive VSAT earth stations at Monroe, North Carolina (Call Signs E890699, E890700 and E890701) for the provision of services between the United States and Canada

BURROUGHS WELLCOME CO. CSG-89-139-ML

Application for authority to modify its license for a 5.5-meter Ku-band transmit/receive fixed earth station at Research Triangle Park, North Carolina (Call Sign E880790) for the provision of services between the United States and Canada via all U.S. domestic satellites and the Anik satellite system

GENERAL ELECTRIC RADIO SERVICES CORPORATION CSG-89-140-ML

Application for authority to modify its license for a 3.7-meter Ku-band transmit/receive fixed earth station at Mountain View, California (Call Sign 890921) for the provision of services between the United States and Mexico via all U.S. domestic satellites and the Morelos satellite system

FONDO UNIMEX, INC. I-T-C-89-143

Application for authority to establish and operate channels of communication for the provision of services between the United States and Mexico

## MEMORANDUM OPINION, ORDER AND AUTHORIZATION

**Adopted: October 27, 1989; Released: November 17, 1989**

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Section 214 and/or Title III of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses, construct new earth station facilities and establish channels of communications to provide transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. These applications were placed on the Commission's public notice. No comments were received.

### THE APPLICATIONS

2. *Telecom Broadcasting, Inc. (TBI) (File No. CSG - 89 - 095 - ML).* TBI seeks authority to modify its license for a five-meter C-band transmit/receive transportable satellite earth station (Call Sign E890681) to permit it to transmit video programming between the United States and Canada, Mexico, Central America and Caribbean locations, by communicating with all satellite systems coordinated under Article XIV(d) of the INTELSAT Agreement for the applicable service.[1] TBI seeks to extend its regular domestic service, subject to the licensing requirements of appropriate governmental authorities, to authorized points of reception. In addition, TBI requests authority to use this authorization to receive video programming from Canada and Mexico, consistent with current and future INTELSAT consultations. TBI states that it will not use the transborder authority requested herein for the transmission of programming to the general public and will not provide transborder video service on a common carrier basis. TBI has previously been authorized to provide transborder services similar to those proposed in this application[2] and TBI states that its application is consistent with the Commission's guidelines concerning transborder service and Article XIV(d) consultations with INTELSAT.

3. *Televisa, S. A. (Televisa) (File No. CSG - 89 - 100 - P/L).* Televisa is a corporation organized under the laws of Mexico. Televisa seeks authority to construct and operate a 3.6-meter Ku-band transmit/receive earth station in Los Angeles, California for the provision of internal (private) voice and data communications between the United States and its headquarters office located in Mexico City, Mexico. Televisa states that the grant of the instant application will enable it to obtain more efficient telecommunications services for its internal communications. Televisa indicates that it will not use the proposed earth station to engage in common carrier offerings. Televisa adds that the use of the INTELSAT system would involve additional, lengthy, terrestrial connections that would impair the reliability of the communications and add sufficient cost so that an INTELSAT-based service would be financially infeasible.

4. *Yale Security (Yale) (File Nos. CSG-89-118-ML, CSG-89-119-ML and CSG - 89 - 120 - ML).* Yale seeks authority to modify its licenses for 1.8, 2.4 and 3.7-meter fixed Ku-band transmit/receive VSAT earth stations at Monroe, North Carolina (Call Signs E890699, E890700 and E890701) to establish and operate channels of communication with all Ku-band satellites which have been or will be consulted under Article XIV of the INTELSAT Agreement to provide high speed data and voice transmissions between the U.S. and Canada.

5. *Burroughs Wellcome Co. (Burroughs) (File No. CSG - 89 - 139 - ML).* Burroughs seeks authority to modify its license for a 5.5-meter Ku-band transmit/receive fixed earth station at Research Triangle Park, North Carolina (Call Sign E880790) for the provision of private transborder communications between the United States and Canada via all U.S. domestic satellites and the Canadian Anik satellite system. Specifically, Burroughs will use the subject earth station to conduct intracorporate video teleconferencing among its offices located in the United States and Canada.

6. *General Electric Radio Services Corporation (GERSC) (File No. CSG -89 - 140 - ML).* GERSC seeks authority to modify its license for a 3.7-meter Ku-band transmit/receive fixed earth station at Mountain View, California (Call Sign 890921) for the provision of transborder services between the United States and Mexico via all U.S. domestic satellites and the Morelos satellite system. GERSC proposes to use the facility to communicate between geographically dispersed facilities in the United States and Mexico for internal company use.

7. *Fondo Unimex (Unimex) (File No. I - T - C - 89 - 143).* Unimex is a Delaware corporation, the shares of which are wholly owned by Univisa, Inc. (Univisa). Univisa, also a Delaware corporation, is owned by Univisa, S.A. which through intermediary family holding companies is owned by shareholders, officers and directors of Televisa, S.A. (Televisa). Televisa is a Mexican corporation that supplies Spanish-language programming within the United States and Mexico and which operates broadcast networks in Mexico. Unimex intends to operate as a non-dominant international provider of business and other services between points in the United States and points in Mexico via all U.S. domestic satellites and the Morelos satellite system. Specifically, Unimex seeks authority to establish and operate channels of communication between earth stations in the United States and Mexico for the provision of business services (including telegraph, telegraph-like services, facsimile, data transmission and reception services, electronic document distribution and video teleconferencing), occasional video and associated audio service and subcarrier data and program material services. Unimex states that the grant of the instant application will provide its customers with efficient telecommunications services between the United States and Mexico.

## DISCUSSION

8. In 1981, following consultations with the Department of State, the Commission gave initial approval for the use of U.S. domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. Based on these criteria, the Commission has authorized over 200 applications for transborder service between the United States and Canada, Mexico, Latin America and the Caribbean locations. In addition, consultations under Article XIV(d) of the INTELSAT Agreement have been successfully completed for the provision of transborder services to several countries. [3]

9. The subject applications request authority to provide services similar to those services previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. For the most part, the applications involve the modification of domestic earth station licenses to extend existing or planned domestic networks to provide business and video services between the United States and Canada and Mexico using U.S. domestic satellites as well as the Anik and Morelos satellites. In addition, TBI requests authority to transmit video programming to Latin American/Caribbean locations which have been consulted under Article XIV(d) of the INTELSAT Agreement.

10. Under these circumstances, we conclude that a grant of the subject applications is consistent with the Commission's Transborder policy and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[4] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network. The same considerations also apply to the receive-only video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of a small, receive-only earth station for little or no additional cost.[5] The incidental reception of this programming in transborder locations is consistent with our Transborder policy and existing INTELSAT consultations. In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum.

11. Finally, Unimex has expressed its intention to operate as a non-dominant common carrier providing a range of transborder services between the U.S. and Mexico. However, Unimex's application indicates that it is wholly-owned by Univisa, Inc., a Delaware corporation. Univisa, Inc. is owned by Univisa S.A. which through intermediary family holding companies is owned by the shareholders, officers and directors of Televisa, a Mexican corporation which provides television programming within the United States and Mexico. Under this scenario, we conclude that Unimex should be treated as dominant consistent with the Commission's decision in *International Competitive Carrier*.[6]

12. Accordingly, IT IS ORDERED that the applications of TBI (File No. CSG-89-095-ML), Televisa (File No. CSG-89-100-P/L), Yale (File Nos. CSG-89-118-ML, CSG-89-119-ML, and CSG-89-120-ML), Burroughs (File No. CSG-89-139-ML), GERSC (File No. CSG-89-140-ML) and Unimex (File No. I-T-C-89-143) ARE GRANTED and the applicants are authorized to modify the licenses for their existing earth station facilities and/or construct new earth station facilities and establish channels of communication to provide the transborder services requested in their applications consistent with Attachments 1 and 2.

13. IT IS FURTHER ORDERED that Unimex may not provide its common carrier services through the earth station facilities authorized herein to Televisa and none of the earth stations authorized herein to provide private service shall be used to provide common carrier services.

14. IT IS FURTHER ORDERED that the grant of authority to Unimex is subject to the condition that Unimex will be classified as dominant in the provision of its international common carrier services between the U.S. and Mexico absent an express determination by the Commission that Unimex is non-dominant.

15. IT IS FURTHER ORDERED that as a dominant common carrier Unimex must file the following: a) copies of any operating agreements entered into with U.S. telecommunications entities within 30 days of their execution; b) annual reports of telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988); c) a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized herein; d) reports required by Section 43.81 of the Commission's Rules[7] and e) quarterly reports required by the *International Competitive Carrier* decision.[8]

16. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

17. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

18. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

## ATTACHMENT 1

## U.S. Satellites Consulted Pursuant to Article XIV(d)

### Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

| Country | Service[s] | Satellite[s] |
|---|---|---|
| Anguilla | T.V. and audio receive-only | all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1 |
| Antigua and Barbuda | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Bahamas | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Barbados | T.V. receive-only | all Galaxy, Satcom and Westar satellites listed in Attachment 1 |
| Belize | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Bermuda | T.V. and audio receive-only | all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1 |
| British Virgin Islands | T.V. and audio receive-only | all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1 |
| Canada | occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications) | all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2 |
| Cayman Islands | T.V. and audio receive-only | all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1 |

| | | |
|---|---|---|
| Colombia | T.V. receive-only | Galaxy I and III, Satcom IR, IIIR, IV and V, Westar IV, Westar V and Westar (269E) |
| Costa Rica | T.V. receive-only | all satellites listed in Attachment 1 |
| Dominica | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Dominican Republic | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| El Salvador | T.V. receive-only | all satellites listed in Attachment 1 |
| Grenada | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Guatemala | T.V. and audio receive-only | all satellites listed in Attachment 1 |
| Haiti | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Honduras | T.V. receive-only | all satellites listed in Attachment 1 |
| Jamaica | T.V., audio and data receive-only (See note 3) | all satellites listed in Attachment 1 |
| Mexico | Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications) | all satellites listed in Attachment 1 plus the Morelos I and II satellites |
| Monsterrat | T.V., and audio receive-only | all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1 |
| Netherlands Antilles | T.V. receive-only | Galaxy I, Satcom III-R and IV, |

| | | Westar IV and V and Comstar D4 |
|---|---|---|
| Panama | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| St. Christopher-Nevis | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| St. Lucia | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| St. Vincent and the Grenadines | T.V., audio and data receive-only | all satellites listed in Attachment 1 |
| Trinidad and Tobago | T.V. receive-only | all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1 |
| Turks & Caicos | T.V. and audio receive-only | all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1 |
| Venezuela | T.V. receive-only | all satellites listed in Attachment 1 |

**Notes**

1) With the exception of Mexico and Canada, which were consulted separately, all services (i.e. T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions).

## FOOTNOTES

[1] Although TBI's application appears to request authority to provide service "between" the U.S. and Latin American/Caribbean locations, we note that only one-way, receive-only service has been consulted from the U.S. to those locations.

[2] TBI's previous transborder application provided the Department of State with a letter concerning copyright protection for transmissions. TBI states that it uses scrambling to provide protection against unauthorized reception.

[3] *See* Attachments 1 and 2.

[4] Satellite Business Systems, 88 FCC 2d 195 (1981).

[5] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

[6] In the International Competitive Carrier proceeding, the Commission determined that a carrier that is more than 15% directly or indirectly owned by a foreign telecommunications entity, or on whose board a foreign telecommunications entity sits, shall be considered to be foreign-owned for the purposes of the Commissions' international competitive carrier policy. *See* International Competitive Carrier, Report and Order, 102 FCC 2d 812 (1985), reaffirmed on reconsideration, 60 R.R. 2d (P&F) 1435 (1986). Subsequently, the Commission clarified that foreign telecommunications entities include telecommunications and telecommunications-related equipment manufacturers, equipment suppliers, and service providers. *See* Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry, CC Docket No. 86-494, FCC 88-71 (released March 25, 1988).

[7] *See* Regulatory Policies and International Telecommunications, 4 FCC Rcd 323, 338 (1989), Appendix A.

[8] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), footnote 76.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO. File No. I-T-C-89-159

Application for authority to acquire and operate facilities for service between the U.S. and Haiti.

**ORDER AND AUTHORIZATION**

**Adopted: November 7, 1989; Released: November 17, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 8, 1989 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate microwave facilities in the Dominican Republic for the provision of service between the U.S. and Haiti and beyond. The application was placed on public notice on September 13, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-159 IS GRANTED, and AT&T is authorized to:

a. acquire from Compania Dominicana de Telefonos, C. Por A. (CODETEL), on a right of passage basis, a one-half interest in 90 MAUOs in the digital microwave system between the Santo Domingo terminal of the TCS-1 cable and the Dominican Republic - Haiti border; and

b. activate and operate said facilities, together with matching interests provided by Teleco D'Haiti and authorized facilities in the TCS-1 Cable System, to establish 90 MAUOs for the provision of AT&T's regularly authorized services between the U.S. and Haiti and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of right of passage agreement between AT&T and CODETEL, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY — File No. I-T-C-89-156

Application for authority to acquire and operate facilities for service between the U.S. and Colombia.

**ORDER AND AUTHORIZATION**

**Adopted: November 7, 1989; Released: November 17, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 5, 1989 by American Telephone & Telegraph Company (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate additional facilities for the provision of its authorized services between the U.S. and Colombia. The application was placed on public notice on September 6, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-156 IS GRANTED, and AT&T is authorized to:

a. utilize for service between the U.S. and Colombia its interest in up to 24 voice-grade circuits in the Third Florida Cable and the Venezuela-2 Cable presently authorized for service to Venezuela;

b. lease a one-half interest in and operate up to 24 voice-grade half circuits in transiting facilities between the cable terminal of the Venezuela-2 cable and the Venezuela/Colombia border; and

c. use said facilities together with matching facilities provided by its correspondent in Colombia to provide AT&T's regularly authorized services between the U.S. and Colombia and beyond.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

8195 ☆ U.S. GOVERNMENT PRINTING OFFICE. 1989— 261 - 072 20004